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A TREATISE

ON THE

LAW OF NOTICE

AS

AFFECTING CIVIL RIGHTS AND REMEDIES.

BY
WILLIAM P. WADE.

SECOND EDITION.

CHICAGO:
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1886.

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TO

SEYMOUR D. THOMPSON, ESQ.,

OF THE ST. LOUIS BAR,

THIS BOOK IS INSCRIBED IN ACKNOWLEDGMENT OF HIS VALUABLE LABORS AS A

LEGAL JOURNALIST, CONTRIBUTOR AND AUTHOR,

AS A TRIBUTE TO HIS WORTH AS A CITIZEN AND A LAWYER, AND ALSO AS A TOKEN OF THE WARM PERSONAL REGARD ENTERTAINED FOR HIM BY

THE AUTHOR.

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PREFACE TO FIRST EDITION.

A custom has grown up among authors, especially *new* authors, of apologizing to the members of the profession for making still another new book. This portion of the customary preface will be omitted here, because in the first place there seems no one to whom such an apology is due. Those who have no use for a text-book upon the subject of NOTICE have no right to resent its publication, and those who feel the want of it will require no excuse for an attempt to supply that want. Their criticism will only be directed to the manner of executing the work. In the second place, the writer had experienced no inconsiderable annoyance and vexation in his own practice, which might have been avoided had there been any work at all upon the subject, and commenced the collection of materials for the following pages under the belief that such a book was necessary, when there was no prospect of the want being supplied by any one else. Having undertaken the task, influenced by this conviction, apologies for doing so can hardly be in order. For what the book lacks, either in thoroughness or skillfulness of treatment, or in convenience of arrangement, the author is profoundly regretful, and awaits the criticism and candid suggestions of his readers with an abiding faith that they will be in the main just and fair. But he would ask them to consider, particularly with respect to the arrangement of topics, that he was without a model or guide which contained a single suggestion in this direction. Those upon whom he felt at liberty to call for advice were either too busy to consider the matter with care, or acknowledged their inability to make suggestions which were even satisfactory to themselves. Some of the difficulties in

the way of an easy solution of this problem were made apparent by the oft-repeated interrogatory of those to whom the title of the proposed book was explained — "Notice of what?" In arranging the different chapters and subdivisions the intention has been to group the topics according to their relations to each other, and to present all the law upon each without unnecessary repetition. That these purposes have been measurably thwarted will not be a matter of surprise to those who have critically examined many law books. In endeavoring to carry out this plan it was found necessary to travel over a great deal of ground and accumulate no inconsiderable portion of matter without regard to the order of arrangement, and when arranged a great deal of what had been written had to be re-written to make it conform to the relative positions of the chapters. After all the writer feels bound to confess that the arrangement finally determined upon is to some extent arbitrary. Those who examine the work will doubtless find many other features where improvements may be suggested. By enlarging the volume, useful matter might be added both to the text and to the notes. But laboring under the impression that there was a limit beyond which such a work could not with propriety be extended, many merely cumulative authorities, and those illustrating points of doubtful utility, have been rejected. If the *most* important, and, in fact, all the *more* important cases have not been cited, it is for the reason that the author was unable to find them. If any have found their way into the table of cases which have not been carefully examined and considered in connection with the doctrine laid down in the text which they are cited to illustrate or confirm, the number is very small indeed, and their presence is owing to inadvertence, and not to a design on the part of the writer to impose upon the profession doubtful authority for the mere purpose of swelling the list and making a show of great industry.

There has been an endeavor in the following pages to present as much of the law bearing upon the subject of Notice as could be compressed within what was considered,

in the light of current criticism, a proper space consistent with a fair and reasonable degree of comment and illustration. A glance at the table of contents will show the different branches of the law into which the doctrine has found its way, and exerted a distinct influence in determining the conflicting rights of parties litigant. No department of jurisprudence where notice has been considered essential, either to bind a party or release him from obligation, has been purposely omitted.

In preparing the book for publication, no model has been followed, for the reason that there was no model to follow, and not because the author desired to make innovations. In one respect, however, there has been an attempt to avoid what in some law books seems to a certain extent a matter of necessity, and in others a most offensive vice — that is, the insertion of all the explanatory portion of the matter in the notes. They leave nothing but the dry husks of the subject in the text, making up for the baldness of treatment in the author's original composition, by profuse quotation in the notes, so extended and discursive as to weary the eye and puzzle the understanding of the reader. The peculiar nature of a subject may be such as to render this sort of annotation necessary; but where the writer of this book has varied from the practice of incorporating in the text all that seemed essential, leaving nothing for the notes but the citation of cases, it was because the matter had been overlooked or was suggested so late as to render its insertion, according to the original plan, impracticable without more labor than the importance of this feature of the work would seem to warrant. Every effort has been made to eliminate all errors and mistakes, and to supply all omissions. The book is offered, not in the belief that the task undertaken has been perfectly executed, but in the conviction that it contains nothing but good law, and is so arranged, and provided with facilities for reference, as to be of considerable use to an overworked profession.

W. P. W.

St. Louis, *May 13, 1878.*

PREFACE TO SECOND EDITION.

In preparing a second edition of this work, I have endeavored to keep in view the suggestions kindly made by many of my professional brethren from time to time, as well as some of the criticisms of the legal press. Unfortunately, however, some of these, which were carefully noted when fresh, have been lost sight of in consequence of a change of residence, and the loss of notes and memoranda made at the time.

The text has received additions to the extent of about one hundred and thirty pages, and a large number of additional cases have been examined and cited. Some changes have also been made in the division of the matter into chapters; but with all these changes the original numbers of sections (§§) have been preserved, and added sections are distinguished by the addition of letters. The appearance of the book, and possibly its excellence in other respects, might have been enhanced by re-writing and re-numbering many of these sections, and carrying the alterations through the entire work; but this more symmetrical treatment of the subject would scarcely have compensated for the abandonment of the old numbers to which reference has been made where the book has been cited. I have still adhered to the original design, which was to present the law upon all branches of the subject of Notice in a form best adapted to the wants of the practitioner. It is intended to throw some light upon every case where the rights of parties may turn upon the question whether one or the other has received notice, or in which a question of notice in any of its multitudinous phases may arise.

In carrying out this plan in the second edition, I have endeavored to meet the expectations of every one who may resort to these pages, even tentatively, if not in furnishing the kind of law of which he is in search, at least something touching the particular subject of inquiry.

For the magnanimous and gracious reception accorded by the profession and the press to this my first effort in the way of authorship, I wish to return my sincere thanks. I also desire to thank the many individuals from whom I have received personal letters of acknowledgment and valuable suggestions of improvement.

With the hope that the work has been improved by revision, it is again submitted to the profession.

W. P. WADE.

Los Angeles, Cal., *March 1, 1886.*

CONTENTS.

CHAPTER I.

THE DIFFERENT KINDS OF NOTICE.

PAGE.

I. Actual Notice, - - - - - - - - 1
II. Constructive Notice, - - - - - - 27

CHAPTER II.

NOTICE TO PURCHASERS OF DIFFERENT KINDS OF PROPERTY, - 36

CHAPTER III.

NOTICE BY REGISTRATION OF INSTRUMENTS.

I. The General Scope and Operation of the Statute, - 69
II. Recordable Instruments, - - - - - - 80
III. Statutory Prerequisites to Recording, - - - 84
IV. Errors in the Record, - - - - - - - 93
V. Errors by the Party Filing the Instrument, - - 106
VI. Conflicting Titles Affected by Priority of Registration, - 114
VII. Other Notice Considered in Connection with Registration, 132

CHAPTER IV.

NOTICE BY POSSESSION, - - - - - - - 150

CHAPTER V.

NOTICE FROM TITLE PAPERS, - - - - - - 171

CHAPTER VI.

LIS PENDENS, - - - - - - - - - 187

CHAPTER VII.

NOTICE BY WHICH CERTAIN LIABILITIES ARE CREATED.

PAGE.
I. Notice of Acceptance of Proposals, - - - - 206
II. Notice of Guaranty, - - - - - - 210
III. Notice of Assignment, - - - - - - 234
IV. Notice to Carriers and Other Bailees, - - - 246
V. Notice of Suit in Ejectment to Warrantor, - - - 263
VI. Notice by Which Liability for Tort May be Fixed, - 269
VII. Notice by Which Certain Contract Liabilities May be Fixed, 274

CHAPTER VIII.

NOTICE BY WHICH LIABILITY IS EXTINGUISHED OR MODIFIED.

I. Dissolution of Partnership, - - - - - 280
II. Notice by Carriers Limiting Their Liability, - - 306
III. Landlord and Tenant, - - - - - - 335

CHAPTER IX.

PRINCIPAL AND AGENT.

I. Notice of Agency, - - - - - - 365
II. Notice to an Agent, - - - - - - 380
III. Notice by an Agent, - - - - - - 401

CHAPTER X.

NOTICE OF DISHONOR OF COMMERCIAL PAPER.

I. By Whom Given, - - - - - - 405
II. To Whom Given, - - - - - - 417
III. Time of Giving Notice, - - - - - - 434
IV. Manner and Mode, - - - - - - 455
V. Waiver and Excuse, - - - - - - 497

CHAPTER XI.

PUBLICATION OF NOTICES.

I. Original Process, - - - - - - - 537
II. Judicial Sales, - - - - - - 557
III. Non-Judicial Involuntary Sales, - - - - 564
IV. Miscellaneous Proceedings, - - - - - 570

CHAPTER XII.

PRACTICE AND PLEADING.

PAGE.

I. Original Process, - - - - - - - - 576
II. Notice of Trial, - - - - - - - 588
III. Notice of Motions and Other Interlocutory Proceedings, - 596
IV. Notice of Appeal, - - - - - - - 606
V. Notice of Taking Depositions, - - - - - - 612
VI. Notice to Produce Books and Papers, - - - 630
VII. Service, - - - - - - - - - 648
VIII. The Return, - - - - - - - - 677
IX. Pleading, - - - - - - - - - 690

CHAPTER XIII.

FACTS OF WHICH COURTS TAKE JUDICIAL NOTICE, - - - 701

TABLE OF CASES CITED.

A.

Abbot *v.* Gerahty, 4 Jr. Ch. 23, § 30.
Abell *v.* Harris, 11 Gill & J. 371, § 280.
v. Howe, 43 Vt. 403, §§ 674, 688, 689.
Abrahams *v.* Stokes, 39 Cal. 150, § 1209.
Abrams *v.* Sheehan, 40 Md. 446, § 96.
Acer *v.* Westcott, 1 Lans. 193; S. C. 46 N. Y. 384, § 329.
Adams' Appeal, 1 Pa. St. 447, § 96.
Adams *v.* Darby, 28 Mo., 162, § 1009.
v. Jones, 12 Pet. 207, § 407.
v. Leavery, 20 Conn. 72, § 436.
v. Otterback, 15 How. 539, § 480*o*.
v. Peck, 4 Ia. 551, § 1242.
v. Rodermel, 19 Ind. 339, § 431.
v. Torbet, 6 Ala. 865, § 738.
v. Wright, 14 Wis. 408, §§ 788, 789, 856, 859.
Adams Ex. Co. *v.* Guthrie, 9 Bush, 78, §§ 553, 555.
v. Haynes, 42 Ill. 89, §§ 553, 555.
v. Loeb, 7 Bush, 501, § 553.
v. Stattaners, 61 Ill. 184, § 555.
Addison *v.* Cox, L. R. 8 Ch. 79, § 433.
Adm'rs of Carson *v.* Phelps, 40 Md. 97, § 225.
Adriance *v.* Hafkemeyer, 39 Mo. 134, § 606.
v. McCafferty, 2 Rob. 153, § 1054.
Agra Bank *v.* Barry, L. R. 7 H. L. 135, § 109.
Aguirre *v.* Parmelee, 22 Conn. 473, § 464.
Aicardi *v.* Strang, 38 Ala. 326, § 1253.
Aickles' Case, 1 Leach Cr. Cas. 330. § 1262.
Aiken *v.* Thompson, 43 Ia. 606, § 481.
Ainsley *v.* Boynton, 2 Barb. 258, § 431.
Airey *v.* Pearson, 37 Mo. 424, § 937.
Alabama, etc. R. Co. *v.* Kidd, 35 Ala. 209, § 568.
Alabama Gold Life Ins. Co. *v.* Cobb, 57 Ala. 547, § 1410.
Alderson *v.* Ames, 6 Md. 52, §§ 113, 254.
v. Bell, 9 Cal. 315, § 1413.
v. Pope, 1 Camp. 404, § 525.
Aldricks *v.* Higgins, 16 S. & R. 212, § 405.
Alexander *v.* Alexander, 5 Pa. St. 277, § 1232.
v. Burnham, 18 Wis. 199, § 1412.
v. Milwaukee, 16 Wis. 247, § 1404.
v. Quigley's Ex'rs, 2 Duv. (Ky.) 339, § 1143.
v. Webster, 6 Md. 359, § 113.
Alford *v.* State, 8 Tex. App. 545, § 1412.
Allday *v.* Great West. R'y Co. 11 Jur. N. S. 12, § 560.
Allegheny *v.* Nelson, 25 Pa. St. 332, § 1408.
Allen, *In re*, 1 Ir. R. Eq. 455, § 246.
Allen *v.* Anthony, 1 Meriv. 282, §§ 65*a*, 281, 282.
v. Avery, 47 Me. 287, § 815.
v. Edmunson, 17 L. J. N. S. Exch. of Pl. 291; 2 Exch. 719, § 1397.
v. Hill, 16 Cal. 113, § 1324.
v. Holding, 29 Ga. 485, § 225.
v. Hubert, 49 Pa. St. 259, § 422.
v. Jaquish, 21 Wend. 628, § 596.
v. Knight, 5 Hare, 272, §§ 47, 48, 65*a*.
v. Mandville, 26 Miss. 397, § 348.

Allen *v.* Mercier, 1 Ash. 103, § 464.
v. Moss, 27 Mo. 354, §§ 127, 211.
v. Ogden, 1 Wash. C. Ct. 174, § 663.
v. Pike, 3 Cush. 238, § 388.
v. Pool, 54 Miss. 323, §§ 65*a*, 307, 348, 674.
v. Rightmere, 20 Johns. 365, §§ 394, 396.
v. Sanders, 2 Bibb, 94. § 48.
v. Scharringhausen, 8 Mo. App. 229, § 1410.
v. Seckham, L. R. 11 Ch. D. 790, § 65*a*.
Allen's Lessee *v.* Parish, 3 Ohio, 107, § 225.
Allman *v.* Owen, 31 Ala. 167, § 1415.
Alvis *v.* Morrison, 63 Ill. 181, § 157.
Alvord *v.* Collin, 20 Pick. 418, § 1109.
American Ex. Co. *v.* Bank, 69 Pa. St. 394, § 558.
Ames *v.* N. Y. Union Ins. Co. 14 N. Y. 253, §§ 672, 689.
Amidown *v.* Osgood, 24 Vt. 278, §§ 486, 515, 522.
Amoskeag Bank *v.* Moore, 37 N. H. 539, § 1023.
Amsbaugh *v.* Gearhart, 11 Pa. St. 482, § 422.
Anchor Line *v.* Dater, 68 Ill. 369, § 555.
Anderson *v.* Anderson, 23 Tex. 639, § 1405*h*.
v. Applegate, 13 Ind. 339, § 1257.
v. Baughman, 6 Mich. 298, § 1331.
v. Biddle, 9 Mo. 580, § 1405.
v. Blakely, 2 W. & S. 237, § 405.
v. Brown, 16 Tex., 554, § 1152.
v. Cape Fear, etc. Co. 64 N. C. 399, § 480*k*.
v. Prindle, 23 Wend. 616, §§ 611, 613.
v. Van Allen, 12 Johns. 343, § 440.
Andrews *v.* Boyd, 3 Metc. 434, § 942.
v. Burns, 11 Ala. 691, § 96.
v. Gillespie, 47 N. Y. 487, § 431.
v. Kneeland, 6 Cow. 354, § 652.
v. McCoy, 8 Ala. 920, § 431.
v. O. & M. R. R. Co. 14 Ind. 169, § 1132.
v. Pond, 13 Pet. 65, § 94.
Angle *v.* N. W. etc. Ins. Co. 92 U. S. 341, § 94.
Anketel *v.* Converse, 17 Ohio St. 11, § 256.
Anon. 1 Nott & McC. 604, § 1257.
Anonymous, 1 Johns. 143, § 1178.
Apperson *v.* Bynum, 5 Cold. 341, § 982.
v. Union Bank, 4 Cold. 445, § 987.
Arbouin *v.* Anderson, 1 Ad. & Ell. 498. § 80.
Argenti *v.* San Francisco, 16 Cal. 255, § 1123.
Armijo *v.* New Mexico, etc. Co. 5 West Coast Rep. 482, § 97.
Arnold *v.* Dinsmore, 3 Cold. 235, § 1091.
v. Dresser, 8 Allen, 435, § 957.
v. Nye, 23 Mich. 286, § 1235.
Ashley *v.* Baillee, 2 Ves. Sr. 368, § 688.
v. Cunningham, 16 Ark. 168, § 359.
Ashley's Adm'x *v.* Martin, 50 Ala. 537, § 1411.
Ashmore *v.* Steam Tow & Trans. Co. 28 N. J. L. 180, § 558.
Ashton *v.* Bayard, 71 Pa. St. 139, §§ 386, 421.
Assignees *v.* Bright, 20 Mo. 298, § 431.
Astor *v.* Wells, 4 Wheat. 466, §§ 192, 193. 672.
Atcheson, etc. R. Co. *v.* Blackshire, 10 Kan. 477, § 1408.
Atkinson, *In re*, 2 De G. M. & G. 140, § 433.
Atkinson *v.* Runnels, 60 Me. 440, § 431.
v. Taylor, 2 Wilson, K. B. 117, § 1159.
Atlantic Tel. Co. *v.* New Orleans & C. R. Co. 2 Cent. L. J. 88, § 1308.
Atterbury *v.* Wallis, 8 De G. M. & G. 454, §§ 47, 56, 672, 689.
Attorney-General *v.* Flint, 4 Hare, 147, § 46.
v. Foote, 11 Wis. 14, § 1404.
v. Jones, 2 Jur. 369, § 30.
v. Pargeter, 6 Beav. 150, § 660.
Atwater *v.* Schenck, 9 Wis. 160, § 1404.
Atwell *v.* Miller, 6 Md. 10, § 1287.
Atwood *v.* Fricot, 17 Cal. 37, §§ 1234, 1251.
v. Hazleton, 3 Bailey (S. C.), 457, § 738.

Atwood *v.* Munning, 7 B. & C. 278, § 664.
v. The Reliance Co. 9 Watts, 87, § 541.
Aubuchon *v.* Bender, 44 Mo. 560, § 226.
Aucher *v.* Bank of England, Doug. 637, § 438.
Auditor *v.* Haycroft, 14 Bush, 284, § 1404.
Auger Steel, etc. Co. *v.* Whittier, 117 Mass. 451, § 1257.
Ault *v.* Gassaway, 18 Cal. 205, § 374.
Avent *v.* McCorkle, 45 Miss. 221, § 230.
Averill *v.* Hedge, 12 Conn. 424, § 383.
Avery *v.* Woodbeck, 5 Lans. (N. Y.) 498, § 1212.
Ayer *v.* Hutchins, 4 Mass. 370, § 90.
Ayers *v.* Duprey, 27 Tex. 593, § 228.
Aymar *v.* Sheldon, 12 Wend. 439, § 822.
Aymer *v.* Beers, 7 Cow. 705, § 992.
Ayrault *v.* Chamberlin, 26 Barb. 83, § 493.
v. Murphy, 54 N. Y. 203, § 341.

B.

B. & M. L. R'y Co. *v.* Unity, 62 Me. 148, § 378.
Babcock *v.* Bridges, 29 Barb. 427, § 149.
v. Bryant, 12 Pick. 133, §§ 389, 401, 413, 425.
v. Lisk, 57 Ill. 327, § 310.
Bachelor *v.* Bachelor, 1 Mass. 256, § 1102.
Backhouse *v.* Harrison, 5 Barn. & Ald. 1098, §§ 80, 82.
Backus *v.* Shipherd, 11 Wend. 629, § 936.
Bacon *v.* Bacon, Tothill, 133, § 307.
v. Gardner, 23 Miss. 60, § 348.
Bagge, *Ex, parte*, 13 Beav. 162, § 676.
Bailey *v.* Bensley, 87 Ill. 556, § 480*o*.
v. Clark, 6 Pick. 372, § 525.
v. Kalamazoo, etc. Co. 40 Mich. 251, § 1417.
v. McGinness, 57 Mo. 362, §§ 343, 348.
v. Myrick, 50 Me. 171, §§ 191, 1065.
v. Richardson, 15 Eng. L. & Eq. 218, § 273.
v. White, 13 Tex. 114, § 273.
Bailey *v.* Wright, 24 Ark. 73, §§ 1243, 1321.
Bainbridge *v.* Moss, 2 Jur. N. S. 58, § 30.
Baker *v.* Barney, 8 Johns. 72, § 671.
v. Bliss, 39 N. Y. 70, §§ 10, 65*a*, 279.
v. Brinson, 9 Rich. 201, § 558.
v. Griffin, 50 Miss. 158, § 205.
v. Hall, 15 Ia. 277, § 72.
v. Martin, 3 Barb. 634, § 480*m*.
v. Mather, 25 Mich. 51, § 310.
v. Mygatt, 14 Ia. 131, § 1414.
v. Rand, 13 Barb. 152, § 402.
v. Robinson, 63 N. C. 191, § 87.
v. Wales, 14 Abb. Pr. 331; 45 How. Pr. 137, § 1358.
v. Woodward, 5 W. Coast Rep. 136, § 231*a*.
Baldney *v.* Ritchie, 1 Stark. 388, § 1272.
Baldwin *v.* Cassella, L. R. 7 Ex. 325. §§ 480*k*, 695.
v. Johnson, Saxt. Ch. 441, § 273.
v. Love, 2 J. J. Marsh. 489, § 369.
v. Richardson, 1 B. & C. 245, § 990.
v. Smith, 82 Ill. 162, § 480*h*.
Ball *v.* Greaud, 14 La. An. 305, § 933.
Ballard *v.* Burgett, 40 N. Y. 314, § 73.
Balling *v.* Carter, 9 Ala. 921, § 371.
Ballitt *v.* Musgrave, 3 Carr. & Kir. 31, § 1138.
Baltimore *v.* Bouldin, 23 Md. 328, § 1127.
v. State, 15 Md. 376, § 1417.
Baltimore, etc. R. Co. *v.* Sherman, 30 Gratt. 602, § 1411.
v. Skeels, 3 W. Va. 556, § 553.
Banco de Lima *v.* Anglo-Peruvian Bank, L. R. 8 Ch. D. 160, § 674.
Bancroft *v.* Cousen, 13 Allen, 50, § 208.
v. Hall, 1 Holt, 476, §§ 823, 889.
Bander *v.* Covill, 4 Cow. 60, §§ 1177, 1178.
Bank *v.* Ammon, 27 Pa. St. 172, § 176.
v. Dill, 5 Hill, 403, § 954.
v. Fordyce, 9 Pa. St. 275, § 431.
v. Grimshaw, 15 La. 321, § 711.
v. King, 14 N. J. L. 45, § 821.
v. Wapples, 4 Har. (Del.) 429, § 939.

Bank of Alexandria *v.* Swann, 9 Pet. 33, §§ 805, 807, 822.
Bank of America *v.* McNeil, 10 Bush, 54, §§ 675, 683*b*.
Bank of Augusta *v.* Earl, 13 Pet. 588, §§ 1302, 1306.
Bank of Brooklyn *v.* McChesney, 20 N. Y. 240, §§ 491, 508.
Bank of Cape Fear *v.* Seawell, 2 Hawks (N. C.), 560, § 714.
Bank of Chenango *v.* Hyde, 4 Cow. 567, § 94*b*.
v. Root, 4 Cow. 126, § 759.
Bank of Columbia *v.* Fitzhugh, 1 Har. & G. 239, § 480*o*.
v. Lawrence, 1 Pet. 578, §§ 877, 883.
Bank of Commonwealth *v.* Mudgett, 45 Barb. 663; S. C. 44 N. Y. 514, § 509.
Bank of Geneva *v.* Howlett, 4 Wend. 323, § 883.
Bank of Greensboro *v.* Clapp, 76 N. C. 482, § 113.
Bank of Ireland *v.* Beresford, 6 Dow. 237, § 94*a*.
Bank of Kentucky *v.* Adams Ex. Co. 93 U. S. 174, § 554.
Bank of Louisville *v.* Curren, 36 Ia. 555, § 29.
Bank of Manchester *v.* Slason, 13 Vt. 334, § 901.
Bank of New Milford *v.* Town of New Milford, 36 Conn. 93, §§ 672, 675, 683.
Bank of Niagara *v.* McCracken, 18 Johns. 493, § 431.
Bank of Orleans *v.* Flagg, 3 Barb. Ch. 316, §§ 65*a*, 273.
Bank of Pittsburgh *v.* Neal, 22 How. 96, § 80.
v. Whitehead, 10 Watts, 397, §§ 683*a*, 683*b*.
Bank of Seaford *v.* Connoway, 4 Houst. 206, § 999.
Bank of South Carolina *v.* Meyers, 1 Bailey, 412, § 943.
Bank of State of Missouri *v.* Vaughn, 36 Mo. 90, §§ 697, 714.
Bank of State *v.* S. C. Manf. Co. 3 Strobh. 190, § 101.
Bank of St. Marys *v.* Mumford, 6 Ga. 44, § 683*b*.
Bank of United States *v.* Bierne, 1 Gratt. 234, § 757.
v. Corcoran, 2 Pet. 121, § 843.
v. Davis, 2 Hill, 451, §§ 33, 672, 681, 682, 683*a*, 690.
v. Goddard, 5 Mason, 366, § 709.
Bank of United States *v.* Hatch, 1 McLean, 90; 6 Pet. 250, § 857.
v. Leathers, 10 B. Mon. 64, § 957.
Bank of Utica *v.* Bender, 21 Wend. 643, § 921.
v. Davidson, 5 Wend. 587, § 922.
v. Mersereau, 3 Barb. Ch. 528, § 216.
v. Phillips, 3 Wend. 408, § 922.
v. Smith, 18 Johns. 230, §§ 715, 929.
Bank of Virginia *v.* Craig, 6 Leigh, 399, § 683*b*.
Bank of Washington *v.* Triplett, 1 Pet. 25, § 480*o*.
Bank of West Tennessee *v.* Davis, 5 Heisk. 436, § 865.
Banks *v.* Banks, 31 Ill. 162, § 1342.
v. Burnham, 61 Mo. 76, § 1414.
Barbaries *v.* Gregory, 64 Cal. 230, § 1193.
Barbaroux *v.* Waters, 3 Met. (Ky.) 304, § 997.
Barbour Co. *v.* Horn, 48 Ala. 649, § 480*g*.
v. Nichols, 3 R. I. 187, § 208.
Barclay, *Ex parte*, 7 Ves. 597, § 702.
Barclay *v.* Weaver, 19 Pa. St. 396, § 939.
Bardsley *v.* Hines, 33 Ia. 157, §§ 1032, 1053.
Bargate *v.* Shortridge, 5 H. L. Cas. 297, § 676.
Barker *v.* Foy, 43 Miss. 260, § 10.
v. Parker, 6 Pick. 80, § 939.
v. Scudder, 56 Mo. 272, § 420.
Barlow *v.* Meyers, 64 N. Y. 41, § 431.
v. Wainwright, 22 Vt. 88, §§ 578, 586.
Barnard *v.* Campau, 29 Mich. 162, § 149.
v. Wheeler, 24 Me. 412, § 665.
Barnes *v.* McClinton, 3 Pa. 67, §§ 7, 30, 31, 250, 673*a*, 685.
v. Reynolds, 4 How. (Miss.) 114, § 767.
v. Trenton Gas Light Co. 27 N. J. Eq. 33, §§ 683*b*, 689.
Barnet *v.* Barnet, 15 S. & R. 72, § 127.
Barney *v.* Currier, 1 D. Chap. 315, § 59.
v. Douglass, 19 Vt. 98, § 436.
v. Grover, 28 Vt. 391, § 431.

Barney *v.* Little, 15 Ia. 527, § 166.
v. McCarty, 15 Ia. 510, § 167.
Barnhart *v.* Greenshields, 9 Moo. P. C. 18; 28 Eng. L. & Eq. 77, §§ 7, 281, 284, 294.
Barradaile *v.* Lowe, 4 Taunt. 93, § 959.
Barret *v.* Evans, 28 Mo. 331, §§ 876, 915.
Barrett *v.* Charleston Bank, 2 McMullen, 191, § 943.
v. Pritchard, 2 Pick. 512, §§ 72, 75.
v. Smith, 4 W. Va. 709, § 1194.
Barr *v.* Mitchell, 7 Oreg. 346, § 87.
Barron *v.* Eldredge, 100 Mass. 455, § 566.
v. Porter, 44 Vt. 587, § 436.
Barrows *v.* Baughman, 9 Mich. 213, § 96.
Barr's Trusts, *In re*, 4 K. & J. 219, § 433.
Barry *v.* Croskey, 2 J. & H. 21, §§ 7, 35.
v. Morse, 3 N. H. 132, § 939.
Bartlett *v.* Glasscock, 4 Mo. 62, § 30.
v. Hawley, 120 Mass. 92, § 794.
v. Isbell, 31 Conn. 296, § 716.
v. Pearson, 29 Me. 9, §§ 436, 443.
v. Robinson, 39 N. Y. 187, § 928.
Barton *v.* Baker, 1 S. & R. 334, §§ 732, 943.
v. Kane, 17 Wis. 37, § 1287.
Bashford *v.* Shaw, 4 Ohio St. 263, § 420.
Baskeville *v.* Harris, 41 Miss. 535, § 957.
Basset *v.* City of St. Joseph, 53 Mo. 290; 14 Am. Rep. 446, § 480*g*.
Bassett *v.* Salisbury Co. 28 N. H. 438, § 1280.
Batchelor *v.* Priest, 12 Pick. 399, §§ 697, 706, 707.
Bateman *v.* Joseph, 2 Camp. 461, § 990.
Bates *v.* Norcross, 14 Pick. 224, §§ 205, 207, 223.
Bath *v.* Montague's Case, 3 Ch. Cas. 110, § 15.
Battle *v.* Eddy, 31 Tex. 368, § 1152.
Batty *v.* McCundie, 3 Car. & P. 202, § 525.
Batuit *v.* Hartley, L. R. 7 Q. B. 594, § 471.
Baxter *v.* Clark, 4 Ired. 127, § 525.
Bay *v.* Coddington, 5 Johns. Ch. 54; S. C. 20 Johns. 637, § 666.
Bayer *v.* Cockerill, 3 Kan. 282, § 369.
Bayley *v.* Bailey, 5 Gray, 505, § 96.
Bayliffe *v.* Butterworth, 1 Exch. 425, § 480*o*.
Bayly *v.* Chubb, 16 Gratt. 284, § 1404.
Baynard *v.* Harrity, 1 Houst. 200, § 480*l*.
v. Norris, 5 Gill, 468, §§ 65*a*, 273.
Bay State Bank *v.* Kiley, 14 Gray, 492, § 609.
Bazemore *v.* Davis, 55 Ga. 504, §§ 207, 310.
Beach *v.* Bay State, etc. Co. 30 Barb. 433, § 1405.
v. Workman, 20 N. H. 379, § 1417.
Beadles *v.* Miller, 9 Bush, 405, § 24.
Beal *v.* Gordon, 55 Me. 482, § 277.
v. Warren, 2 Gray, 447, § 226.
Beals *v.* Allen, 18 Johns. 363, § 652.
v. Peck, 12 Barb. 245, §§ 765, 768.
Bean *v.* Briggs, 4 Ia. 464, § 1405.
v. Green, 12 Me. 422, § 547.
v. Simpson, 16 Me. 49, § 440.
Beard *v.* Beard, 21 Ind. 321, §§ 1083, 1142.
v. Kirk, 11 N. H. 397, § 671.
Beardslee *v.* Horton, 3 Mich. 560, § 94*a*.
Bear River & Auburn, etc. Co. *v.* Boles, 24 Cal. 354, § 1198.
Beasley *v.* Downey, 10 Ired. 284, § 1241.
Beatie *v.* Butler, 21 Mo. 313, §§ 275, 282, 284.
Beavan *v.* Earl of Oxford, 6 De G. M. & G. 492, § 240.
Bebee *v.* Brooks, 12 Cal. 308, § 738.
v. Moore, 3 McLean, 387, § 1388.
Beck *v.* De Baptists, 4 Leigh, 349, § 101.
v. Evans, 16 East. 244, § 560.
Becket *v.* Cardley, 1 Bro. Ch. 353, §§ 8, 13.
Beckman *v.* Shouse, 5 Rawle, 179, § 541.
Beckwith *v.* Smith, 22 Me. 125, §§ 805, 927.
v. Union Bank, 9 N. Y. 211, § 436.
Bedford *v.* McElherron, 2 S. & R. 49, §§ 581, 588.
Beebe *v.* Dudley, 26 N. H. 249, §§ 390, 426.
Beekman *v.* Frost, 18 Johns. 544, §§ 149, 158.

Beekman *v.* Hale, 17 Johns. 134, §§ 391, 393.
Beers *v.* Hawley, 2 Conn. 467, § 113.
Begley *v.* Chose, 4 Daly (N. Y.), 157, § 1212.
Belger *v.* Dinsmore, 51 N. Y. 166, § 554.
Bell *v.* Burnett, 2 J. J. Marsh. 516, § 1417.
v. Fleming, 12 N. J. Eq. 13, § 182.
v. Hagerstown Bank, 7 Gill, 216, § 873.
v. Hall, 2 Dev. 288, § 983.
v. Kellor, 13 B. Mon. 381, § 407.
v. Moss, 5 Whart. 189, §§ 457, 463, 480.
v. State Bank, 7 Blackf. 456, § 876.
v. Twilight, 22 N. H. 500, §§ 290, 297, 316, 322.
Bellamy *v.* Sabine, 1 De G. & J. 566, §§ 338, 356, 360.
Bellas *v.* Lloyd, 2 Watts, 401, §§ 308, 318.
v. McCarty, 10 Watts, 13, §§ 30, 113.
Bellgerry *v.* Branch, 19 Gratt. 393, § 983.
Belmont Branch Bank *v.* Hodge, 35 N. Y. 65, § 80.
v. Morrill, 69 Me. 314, § 1404.
Bemis *v.* McKenzie, 13 Fla. 557, § 738.
Ben Adams, The, 2 Ben. 445, § 577*a*.
Bend *v.* Weitze, 12 Wis. 611, § 94*a*.
Bendy *v.* Boyce, 37 Tex. 443, §§ 1152, 1365.
Benham *v.* Kean, 2 De G. F. & J. 318, § 231.
Bennett *v.* Buchan, 61 N. Y. 222, § 65*a*.
v. Hetherington, 41 Ia. 142, § 1073.
v. Jenkins, 13 Johns. 50, § 480*c*.
v. North British, etc. Ins. Co. 8 Daly, 471, § 1416.
v. Waller, 23 Ill. 97, § 143*a*.
v. Williams, 5 Ohio, 461, § 348.
Bensley *v.* Mountain Lake Water Co. 13 Cal. 306, § 374.
Bercaw *v.* Cockerill, 20 Ohio St. 163, § 225.
Berdoe *v.* Dawson, 34 Beav. 603, § 29.
Berkley *v.* Lamb, 8 Neb. 399, § 96.
Berkshire Bank *v.* Jones, 6 Mass. 524, § 936.
Berkshire, etc. Co. *v.* Proctor, 7 Cush. 417, § 480*o*.
Berresford *v.* Geddes, Law Rep. 2 C. P. 285, § 1170.
Berridge *v.* Fitzgerald, 4 Q. B. 639, § 867.
Berry *v.* Cooper, 28 Ga. 543, § 558.
v. Robinson, 9 Johns. 121, § 738.
v. Southern Bank of Ky., 2 Dev. 379, § 983.
Berson *v.* Neman, 63 Cal. 550, § 97.
Bertram *v.* Cook, 32 Mich. 518, § 316.
Bessozzi *v.* Harris, 1 F. & F. 92, § 480*i*.
Best *v.* Hoppie, 3 Colo. 139, § 87.
v. Osborn, 1 Carr. & P. 632, § 1274.
Betser *v.* Ranken, 77 Ill. 289, § 119.
Bevan *v.* Lord Oxford, 6 De G. M. & G. 492, § 434.
Bevens *v.* Baxter, 23 Ark. 387, § 1404.
Beverly *v.* Ellis, 1 Rand. 102, § 101.
Beymer *v.* Bonsall, 79 Pa. St. 298, § 671.
Bickerdike *v.* Bollman, 1 T. R. 405, § 1001.
Bickford *v.* Gibbs, 8 Cush. 154, § 427.
Bierce *v.* Red Bluff Hotel Co. 31 Cal. 160, §§ 674, 677.
Bilbie *v.* Lumley, 2 East, 469, § 975.
Biles *v.* Stanton, 69 Ill. 51, § 1161.
Billingsley *v.* Dean, 11 Ind. 331, § 1405.
Billington *v.* Welsh, 5 Binn. 129, § 293.
Bingamore *v.* Hyatt, 1 Sm. & M. Ch. 437, § 8.
Bingham *v.* Rogers, 6 W. & S. 495, §§ 541, 558.
Birbeck *v.* Tucker, 2 Hall (N. Y. City), 121, § 1273.
Birch *v.* Ellames, 2 Anst. 427, § 56.
Bird *v.* Brown, 4 Exch. 786; 14 Jur. 132, §§ 461, 464, 480.
v. Dennis, 7 Cal. 297, § 97.
v. Le Blanc, 6 La. An. 470, § 935.
v. Wilkenson, 4 Leigh, 266, § 101.
Birdsall *v.* Heacock (Sup. Ct. Com'rs O.), 18 Am. L. Rec. 751, § 391.
v. Russell, 29 N. Y. 220, § 46.
Birkett *v.* Willan, 2 B. & Ald. 356, § 558.
Birks *v.* Trippet, 1 Saund. 32, § 393.

Birnie *v.* Main, 29 Ark. 591, § 203.
Bisco *v.* Earl of Banbury, 1 Ch. Cas. 287, § 307.
Bishop *v.* A Copyholder, Freem. Ch. 137, § 18.
v. Dexter, 2 Conn. 419, § 738.
v. Garcia, 14 Abb. Pr. 69, § 431.
v. Halcomb, 10 Conn. 444, § 436.
v. Jones, 28 Tex. 294, § 1411.
v. O'Connell, 56 Mo. 159, § 67.
v. Schneider, 46 Mo. 472, §§ 133, 165.
v. State, 30 Ala. 34, § 1412.
Bishop of Winchester *v.* Paine, 11 Ves. Ch. 194; 1 Ch. Cas. 150, §§ 344, 346.
Bissell *v.* Irwin, 13 La. 143, § 480*c*.
Bixby *v.* Smith, 49 How. Pr. 50; 5 Thomp. & C. 281, § 1038.
v. Warden, 46 How. Pr. 239, § 1213.
Blackman *v.* Leonard, 15 La. An. 59, § 794.
Blackham *v.* Doren, 2 Camp. 503, §§ 1004, 1015.
Blair *v.* Compton, 33 Mich. 414, § 1097.
v. Ward, 10 N. J. Eq. 119, § 203.
Blaisdell *v.* Stevens, 16 Vt. 179, §§ 10, 11, 21.
Blake *v.* Bigelow, 5 Ga. 437, §§ 342*a*, 353.
v. Graham, 6 Ohio St. 580, §§ 205, 206, 223.
Blanchard *v.* Page, 8 Gray, 281, § 472.
v. Ware, 43 Ia. 530, §§ 339, 342*a*.
Blankenship *v.* Douglass, 26 Tex. 225, § 288.
v. Rogers, 10 Ind. 333, § 1006.
Blatchley *v.* Osborn, 33 Conn. 226, §§ 3, 17, 30, 53.
Bleeker *v.* Hyde, 3 McLean, 279, § 394.
Blenden *v.* Charles, 7 Bing. 246, § 480*m*.
Bliven *v.* New Eng. Screw Co. 23 How. 420, § 480*n*.
Blood *v.* Blood, 23 Pick. 80, §§ 112, 125.
Bloom *v.* Noggle, 4 Ohio St. 45, §§ 225, 231*a*.
Bloomer *v.* Henderson, 8 Mich. 395, § 299.
Blossom *v.* Griffin, 13 N. Y. 569, § 557.
Blum *v.* Bidwell, 20 La. An. 43, § 957.
Blumenburg *v.* Myers, 32 Cal. 93, § 585.
Blumenthal *v.* Brainard, 38 Vt. 402, §§ 568, 570, 674, 688.
Boardman *v.* Gore, 15 Mass. 331, § 525.
Board of Com'rs *v.* Babcock, 5 Or. 472, § 165.
v. Spitler, 13 Ind. 235, § 1410.
Boatright *v.* Porter, 32 Ga. 130, § 1269.
Bobb *v.* Woodward, 42 Mo. 482, §§ 1031, 1056.
Bodenham *v.* Bennett, 4 Price, 31, §§ 558, 560.
Boehm *v.* Combe, 2 M. & S. 172, § 532.
Bogan *v.* Williams, 3 Younge & J. 150, § 13.
Bogy *v.* Keil, 1 Mo. 743, § 1017.
Boggs *v.* Anderson, 50 Me. 161, § 277.
v. Black, 1 Binn. 333, § 649.
v. Varner, 6 Watts & S. 469, §§ 29, 46, 119, 263, 278, 288, 294, 315, 316, 322.
Bogue *v.* Williams, 48 Ill. 371, §§ 273, 279, 288.
Bohlen *v.* Cleveland, 5 Mason, 174, § 436.
Bohn *v.* Devlin, 28 Mo. 319, § 1229.
Bohr *v.* Steamboat Baton Rouge, 7 Sm. & M. 715, § 1242.
Bolard *v.* Mason, 66 Pa. St. 138, § 1362.
Bolles *v.* Chauncey, 8 Conn. 389, § 208.
Bollin *v.* Connelly, 73 Pa. St. 336, § 343.
Bolton *v.* Lanc. & York R'y Co. L. R. 1 C. P. 431; 35 L. J. C. P. 137, § 466.
Bond *v.* Farnham, 5 Mass. 170, §§ 732, 943.
v. Wilson, 8 Kan. 228, § 1379.
v. Whitfield, 28 Ga. 537, § 1335.
Bondurant *v.* Everett, 1 Met. (Ky.) 658, § 876.
Bonner *v.* Ware, 10 Ohio, 465, § 311.
Boon *v.* Pierpont, 28 N. J. Eq. 7, § 185.
Boorman *v.* Ex. Co. 21 Wis. 152, § 553.
Boot *v.* Franklin, 3 Johns. 207, § 1396.
Booth *v.* Barnum, 9 Conn. 286, § 11.

Borden *v.* Clark, 26 Mich. 410, § 94*a*.
v. State, 11 Ark. 519, § 1160.
Borroscale *v.* Tuttle, 5 Allen, 377, § 339.
Bossard *v.* White, 9 Rich. Eq. 483, §§ 119, 121.
Boston *v.* State, 5 Tex. App. 383, § 1410.
Bostwick *v.* Powers, 12 Ia. 456, §§ 97, 168.
v. Railroad, 45 N. Y. 712, § 557.
Botsford *v.* O'Connor, 57 Ill. 72, § 1367.
Boulden *v.* Lanahan, 29 Md. 200, § 239.
Boullement *v.* State, 28 Ala. 83, § 1417.
Boursot *v.* Savage, L. R. 2 Eq. 134, § 672.
Bovey *v.* Smith, 1 Ver. 60, § 63.
Bowles *v.* Round, 5 Ves. 508, § 65*a*.
Bowling *v.* Arthur, 34 Miss. 41, § 847.
v. Harrison, 6 How. 248, §§ 844, 847, 875.
Bowman *v.* Lee, 48 Mo. 335, § 231.
v. Van Kuren, 29 Wis. 218, § 94*a*.
v. Wettig, 39 Ill. 416, § 1260.
Boyce *v.* Shiver, 3 S. C. 515, § 101.
Boyd *v.* Beck, 29 Ala. 703, § 231.
v. City Savings Bank, 15 Gratt. 501, §§ 764, 844, 926.
v. Cleveland, 4 Pick. 524, § 941.
v. Graham, 5 Mo. App. 403, § 480*n*.
v. McCann, 10 Md. 118, § 504.
v. Orton, 16 Wis. 495, § 764.
v. Schlesinger, 59 N. Y. 301. § 123.
v. Whitfield, 19 Ark. 447, §§ 480*c*, 480*l*.
Boynton *v.* Bodwell, 113 Mass. 531, §§ 631, 647.
v. Clinton & Essex Ins. Co. 16 Barb. 254, § 447.
Bozon *v.* Williams, 3 Younge & J. 150, § 47.
Brable *v.* Hollywell, 1 Croke, 250, § 1387.
Bracken *v.* Miller, 4 W. & S. 102, §§ 672, 674, 688.
Brackett *v.* Rich, 23 Minn. 485, § 418.
Bradford *v.* Corey, 5 Barb. 461, § 1025.
Bradley *v.* Covel, 4 Cow. 349, § 591.
v. Davis, 26 Me. 45, §§ 829, 836.
Bradley *v.* Hardin, 73 Ala. 70, § 1405.
v. McDaniel, 3 Jones, 128, § 343.
v. Riches, L. R. 9 Ch. D. 189, §§ 56, 690.
v. Snyder, 14 Ill. 263, §§ 273, 278, 288.
v. Wheeler, 44 N. Y. 500, § 480*n*.
Bradshaw *v.* Mayfield, 18 Tex. 21, § 1411.
Brady *v.* Page, 59 Cal. 52, § 1410.
Bragg *v.* Bangor, 51 Me. 532. § 480*g*.
v. Paulk, 42 Me. 502, § 316.
v. Rush Co. 34 Ind. 403, § 1409.
Brahn *v.* Jersey City Forge Co. 38 N. J. L. 74, §§ 620, 698, 701.
Brailsford *v.* Williams, 15 Md. 150, § 710.
Braley *v.* Buchanan, 21 Kan. 555, § 735.
v. Seaman, 30 Cal. 610, § 1036.
Braman *v.* Wilkinson, 3 Barb. 151, § 373.
Branch Bank *v.* Gafney, 9 Ala. 153, § 738.
v. Steele, 10 Ala. 915, §§ 683, 683*b*.
Brandao *v.* Barnett, 12 C. & F. 787, § 1404.
Brandt *v.* Klein, 17 Johns. 335, § 1272.
Brashear *v.* West, 7 Pet. 608, § 431.
Bratton's Appeal, 8 Pa. St. 164, § 96.
Bray *v.* Gunn, 53 Ga. 144, § 668.
v. Hadwen, 5 M. & S. 68, §§ 796, 824.
Breed *v.* Conley, 14 Ia. 269, § 167.
v. Hillhouse, 7 Conn. 523, §§ 394, 418, 956, 969.
Bretz *v.* Mayor, etc. of N. Y. 6 Rob. (N. Y.) 325, § 1404.
Brewer *v.* Springfield, 97 Mass. 152, § 1079.
Brice *v.* Brice, 5 Barb. 533, § 65*a*.
Bridge *v.* Beadon, L. R. 3 Eq. 664, §§ 7, 35, 443.
Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275, § 480*l*.
Bridges *v.* Arnold, 37 Ia. 221, § 1383.
Briffitt *v.* State, 58 Wis. 39; 46 Am. Rep. 621, § 1416.
Briggs *v.* Boyd, 37 Vt. 538, § 94*b*.
v. Green, 33 Vt. 565, § 1221.
v. Jones, L. R. 10 Eq. 92, § 65*a*.
v. Palmer, 20 Barb. 392, § 310.
v. Sneghan, 45 Ind. 14, §§ 1159, 1161.
v. Taylor, 28 Vt. 180, §§ 11, 65*a*.
Bright *v.* Young, 15 Ala. 112, § 1280.

Brighton Market Bank *v.* Philbrick, 40 N. H. 506, § 990.
Bright's Trusts, *Re*, 21 Beav. 430, § 35.
Brindley *v.* Barr, 3 Harr. (Del.) 419, §§ 846, 873.
Brinkman *v.* Jones, 44 Wis. 498, §§ 10, 11, 244, 246.
Brinton *v.* Scevers, 12 Ia. 389, § 112.
Brisban *v.* Boyd, 4 Paige, 17, § 383.
Bristol *v.* Sprague, 8 Wend. 423, § 519.
Bristow *v.* Secqueville, 5 Exch. 275; 19 L. J. Ex. 289, § 1405.
Britton's Appeal, 45 Pa. St. 172, §§ 227, 231*a*, 238.
Broadbent *v.* Barlow, 3 De G. F. & G. 570, §§ 10, 56, 65*a*.
Broad Street Hotel *v.* Weaver, 57 Ala. 26, § 1408.
Brock *v.* Headen, 13 Ala. 370, § 205.
Bronson *v.* Coffin, 118 Mass. 156, § 662.
v. Kensey, 3 McLean, 180, § 1257.
Brooke *v.* Pickwick, 5 Bing. 218, § 544.
Brooklyn Trust Co. *v.* Bulmer, 49 N. Y. 84, § 1352.
Brooks' Appeal, 64 Pa. St. 127, § 96.
Brooks *v.* Blaney, 62 Me. 456, § 838.
v. Hey, 23 Hun, 372, § 94*b*.
Brotherton *v.* Hatt, 3 Vern. 574, §§ 687, 690.
v. Livingston, 3 W. & S. 334, § 183.
Broughton *v.* Journeay, 51 Pa. St. 31, § 1107.
Brower *v.* Brooks, 11 Barb. 423, § 1192.
Brown *v.* Andover, 1 Mon. 193, § 44.
Bankers', etc. Co. 30 Md. 39, § 674.
v. Brooks, 25 Pa. St. 210, § 421.
v. Budd, 2 Ind. 442, § 119.
v. Clark, 28 Vt. 690, § 1414.
v. Clement, 68 Ill. 192, § 1251.
v. Dean, 3 Wend. 208, § 187.
v. Eastern R. R. Co. 11 Cush. 97, § 543.
v. Ford, 52 Me. 479, § 1244.
v. Furguson, 4 Leigh, 37, § 797.
v. Gaffney, 28 Ill. 149, §§ 273, 276.
v. Goodwin, 75 N. Y. 409, §§ 351, 354.
v. Grand Trunk R. R. Co. 54 N. H. 535, § 555.
Brown *v.* Leonard, 2 Chit. 120, §§ 483, 486, 524.
v. Lunt, 37 Me. 423, §§ 112, 136.
v. Maffey, 15 East, 216, §§ 1004, 1010.
v. Patton, 3 Humph. (Tenn.) 135, § 671.
v. Piper, 91 U. S. 37, § 1417.
v. Savage, 4 Drew, 635, § 437.
v. Simons, 44 N. H. 475, § 310.
v. Simpson, 4 Kan. 76, §§ 127, 128.
v. State, 8 Heisk. (Tenn.) 871, §§ 1195, 1203.
v. Taylor, 13 Vt. 637, § 480*c*.
v. Turner, 15 Ala. (N. S.) 832, §§ 751, 754.
v. Volkenning, 64 N. Y. 76, §§ 279, 288, 290, 291.
v. Wells, 44 Ga. 573, § 3.
Brownfield *v.* Dyer, 7 Bush, 505, §§ 1343, 1344.
Browning *v.* Kinnear, Gow. 81, § 990.
v. Paige, 7 How. Pr. 487, § 1179.
Brown's Trust, *In re*, L. R. 5 Eq. 88, § 433.
Bruce *v.* Cloutman, 45 N. H. 37, § 1138.
Bruen *v.* Bruen, 43 Ill. 408, § 1201.
Brundage *v.* Biggs, 25 Ohio St. 652, § 339.
Brune *v.* Thompson, 2 Q. B. 789; 2 G. & D. 110, § 1410.
Brush *v.* Halloway, 2 J. J. Marsh. 180, § 65*a*.
v. Scribner, 11 Conn. 388, § 80.
v. Ware, 15 Pet. 93; S. C. 1 McLean, 533, § 311.
Brushaben *v.* Stigemann, 22 Mich. 199, § 1168.
Bryant *v.* Booze, 55 Ga. 438, §§ 52, 55, 65.
v. Merchants' Bank of Kentucky, 8 Bush, 43, § 936.
v. Moore, 26 Me. 84, § 658.
Brydolf *v.* Wolf, 32 Ia. 509, § 1338.
Brydon *v.* Campbell, 40 Md. 331, §§ 140, 149.
Bryne *v.* Roberts, 31 Ia. 319, § 1041.
Buchanan *v.* Curry, 19 Johns. 137, § 748.
v. Findlay, 9 B. & C. 738, § 94*b*.
v. International Bank, 78 Ill. 500, § 208.
v. Marshall, 22 Vt. 561, § 936.
Buck *v.* Paine, 50 Miss. 648, §§ 10, 30, 65*a*, 279.

Buckingham *v.* Hanna, 2 Ohio St. 551, § 214.
v. Smith, 10 Ohio, 228, § 44.
Buckinghouse *v.* Gregg, 19 Ind. 401, §§ 1409, 1411.
Buckley *v.* Furniss, 15 Wend. 137, § 464.
v. Garrett, 47 Pa. St. 204, § 448.
v. Lewis, 20 Wis. 490, § 1180.
Buckman *v.* Levi, 3 Camp. 414, §§ 453, 454.
Buckmaster *v.* Needham, 22 Vt. 617, § 290.
Buckner *v.* Jones, 1 Mo. App. 538, §§ 88, 90.
Buel *v.* Warner, 33 Vt. 570, § 1404.
Buell *v.* State, 72 Ind. 523, § 1413.
Buffalo Pipe Line Co. *v.* N. Y. etc. R. Co. 10 Abb. N. C. 107, § 1410.
Buffalo Steam Engine Works *v.* Sun Mutual Ins. Co. 17 N. Y. 401, § 446.
Buford *v.* Hickman, 1 Hempst. 232, § 1412.
Building Association *v.* Wilson, 41 Md. 514, § 101.
Bull *v.* Bliss, 30 Vt. 127, § 426.
Bundy *v.* Hyde, 50 N. H. 116, § 1232.
Bunker *v.* Gilmore, 40 Me. 88, § 434.
Bunting *v.* Ricks, 2 Dev. & Bat. Eq. 130, §§ 30, 65.
Burbank *v.* Dyer, 54 Ind. 239, § 583.
Burbridge *v.* Manners, 3 Camp. 193, § 782.
Burch *v.* Carter, 44 Ala. 115, §§ 307, 322.
Burdett *v.* Abot, 5 Dow. 165, § 1404.
v. Colman, 14 East, 163, § 1404.
v. Lewis, 7 C. B. (N. S.) 791, § 1337.
Burdine *v.* Grand Lodge of Ala. 37 Ala. 478, § 1417.
Burgess *v.* Vreeland, 24 N. J. L. 71, § 805.
Burgh *v.* Legge, 5 M. & W. 418, § 1397.
Burk *v.* Barnard, 4 Johns. 309, § 1159.
v. Miltenberger, 19 Wall. 519, § 1404.
Burkart *v.* Bucher, 2 Binn. 455, § 312.
Burke *v.* McKay, 2 How. 66, §§ 697, 715.
Burkhalter *v.* Ector, 25 Ga. 55, § 225.
Burling *v.* Read, 11 Q. B. 904, § 480*h*.
Burmester *v.* Barron, 17 Ad. & Ell. 828, § 926.
Burnel *v.* Wood, 2 Roll. 22, § 1390.
Burnett *v.* Henderson, 28 Tex. 588, § 1412.
v. Lynch, 5 B. & C. 28, § 1278.
Burnham *v.* Chandler, 15 Tex. 441, § 120.
v. Gallentine, 11 Ind. 295, §§ 420, 422.
v. Webster, 17 Me. 50, § 936.
Buron *v.* Denman, 2 Exch. 167, § 669.
Burrel *v.* North, 2 Carr. & K. 680, §§ 453, 455, 532.
Burrough *v.* Moss, 10 B. & C. 558, § 728.
Burrows *v.* Hannegan, 1 McLean, 309, § 891.
v. Locke, 10 Ves. 470, §§ 7, 35.
Burrus *v.* Boulhac, 2 Bush, 39, § 325.
Burt *v.* Cassety, 12 Ala. 734, §§ 65*a*, 273.
Burton *v.* Shotwell, 6 Cent. L. J. 31, §§ 299, 378.
v. Wolf, 4 Harr. (Del.) 221, § 1097.
Burwell *v.* Mandeville, 2 How. 560, § 496.
v. Springfield, 15 Ala. 273, § 528.
Burwell's Ex'rs *v.* Fauber, 21 Gratt. 446, § 307.
Busey *v.* Reese, 38 Md. 264, § 96.
Bush *v.* Bush, 2 Duv. (Ky.) 269, § 1158.
v. Garner, 73 Ala. 162, § 1405.
v. Golden, 17 Conn. 594, §§ 114, 191, 281, 294.
v. Lathrop, 22 N. Y. 535, § 436.
v. Ware, 15 Pet. 93, § 65*a*.
Bushell *v.* Bushell, 1 Sch. & L. 90, §§ 104, 107.
Bussard *v.* Levering, 6 Wheat. 102, §§ 781, 844.
Bussey *v.* Leavitt, 12 Me. 378, §§ 1108, 1114.
Butcher *v.* Brownsville, 2 Kan. 70, § 1405.
v. Yocum, 61 Pa. St. 168, § 28.
Butler *v.* Duval, 4 Yerg. 265, §§ 709, 735.
v. Heane, 2 Camp. 415, § 540.
v. Mitchell, 17 Wis. 52, § 1198.
v. Robinson, 75 Mo. 192, § 1408.
v. Stevens, 26 Me. 484, §§ 7, 29, 277.
Buttrick *v.* Holden, 13 Met. 355, §§ 10, 29, 35, 65*a*, 279.

Byers *v.* Engle, 16 Ark. 543, § 96.
Byles *v.* Tome, 39 Md. 461, § 101.
Byrne *v.* Roberts, 31 Ia. 319, § 1041.

C.

Cabeen *v.* Breckenridge, 48 Ill. 91, §§ 246, 273, 276, 288.
v. Campbell, 30 Pa. St. 254, §§ 464, 466.
Cabot Bank *v.* Russell, 4 Gray, 167, § 903.
v. Warner, 10 Allen, 522, §§ 786, 830, 842.
Cady *v.* Hough, 20 Ill. 43, § 1286.
Cahoon *v.* Morgan, 38 Vt. 234, § 438.
Cahuzac *v.* Samini, 29 Ala. 288, § 391.
Calahan *v.* Babcock, 21 Ohio St. 281, § 464.
Calais Steamboat Co. *v.* Van Pelt, 2 Black, 372, §§ 651, 653.
Calder *v.* Chapman, 52 Pa. St. 359, §§ 149, 206, 215.
Calderwood *v.* Brooks, 28 Cal. 151, § 1202.
Caldwell *v.* Head, 17 Mo. 561, §§ 219, 222.
v. McVicar, 9 Ark. 418, § 1253.
Calisher *v.* Forbes, L. R. 7 Ch. 109, § 433.
Call *v.* Hastings, 3 Cal. 179, § 97.
Calvin *v.* Bowman, 16 Ia. 529, § 168.
Camb. & Amb. Railw. *v.* Baldauf, 16 Pa. St. 67, §§ 545, 553, 554, 558.
v. Belknap, 21 Wend. 354, §§ 552, 553.
Cambridge Valley Bank *v.* Delano, 48 N. Y. 326, § 17.
Camden *v.* Guild, 4 Cal. 250, § 1405.
Cameron *v.* Blackman, 39 Mich. 108, § 1417.
Camp *v.* Bates, 11 Conn. 488, § 1397.
v. Steamboat Co. 43 Conn. 333, § 553.
Campbell *v.* Baker, 46 Pa. St. 243, § 422.
v. Brackenridge, 8 Blackf. 471, § 296.
v. Hastings, 29 Ark. 512, § 657.
v. Pettengill, 7 Me. 126, § 1004.
v. Roach, 45 Ala. 667, §§ 307, 328.
Canefox *v.* Crenshaw, 24 Mo. 199, § 480*i*.
Caney *v.* Patton, 2 Ashm. (Pa.) 140, § 671.
Caney *v.* Silverthorn, 9 Cal. 67, §§ 1202, 1329.
Canfield *v.* Hard, 6 Conn. 180, § 496.
Cannon *v.* Franklin, 4 Root, 500, § 155.
Canton *v.* City of Portland, 4 Oreg. 339, § 10.
Cardwell *v.* Allen, 33 Gratt. 157, § 736.
Carey *v.* Butler, 11 Ind. 391, § 1159.
v. Cincinnati, etc. R. Co. 5 Ia. 357, § 1405.
Carland *v.* Cunningham, 37 Pa. St. 228, §§ 1257, 1258.
Carlisle *v.* Tuttle, 3 Ala. 613, § 1236.
Carlton *v.* Patterson, 29 N. H. 580, § 1247.
Carmena *v.* Bank of La. 28 N. H. 302, § 794.
Carmichael *v.* Greer, 55 Ga. 116, § 530.
Carolina Nat'l Bank *v.* Wallace, 13 S. C. 347, § 768.
Carpenter *v.* Dexter, 8 Wall. 513, § 1405.
v. Oaks, 10 Rich. 17, § 87.
v. Reynolds, 42 Miss. 807, § 934.
v. Spooner, 2 Sandf. 717, § 1358.
v. United States, 6 Ct. Cl. 156; 17 Wall. 489, § 593.
Carpentier *v.* Thurston, 30 Cal. 123, § 1329.
Carr *v.* Callagan, 3 Littell, 365, § 355.
Carrington *v.* Brent, 1 McLean, 167; S. C. 9 Pet. 86, § 354.
v. Stimson, 1 Curtis C. Ct. 437, § 1246.
Carson *v.* Dalton, 59 Tex. 500, § 1410.
v. Smith, 5 Minn. 78, § 1406.
Carter *v.* Boelim, 3 Burr. 1905, § 280*n*.
v. Burley, 9 N. H. 558, §§ 795, 805, 815.
v. Champion, 8 Conn. 548, §§ 112, 138.
v. Carter, 2 K. & J. 617, § 48.
v. Daizy, 42 Miss. 501, § 1375.
v. Flower, 16 M. & W. 743, § 1017.
v. Mills, 30 Mo. 432, § 357.
v. Pratt, 9 Md. 73, § 1414.
Cartmell's Case, 9 Ch. App. 691, § 676.
Case *v.* Erwin, 18 Mich. 434, § 307.
v. Hannahs, 2 Kan. 490, § 1143.
v. Mobile, 30 Ala. 538, § 1404.

Cash *v.* Auditor, 7 Ind. 227, § 1410.
Cass *v.* Bellows, 31 N. H. 501, § 1102.
Cass Co. *v.* Green, 60 Mo. 498, §§ 88, 93.
Cassiday *v.* McKenzie, 4 W. & S. 282, § 671.
Caswell *v.* Wendell, 4 Mass. 523, § 480*c*.
Cater *v.* McDaniel, 21 N. H. 231, § 1222.
Cates *v.* Winter, 3 T. R. 306, §§ 1257, 1290.
Cathay *v.* Sydenham, 2 Bro. Ch. 391, § 10.
Catskill Bank *v.* Stall, 15 Wend. 364, § 920.
Cavagnaro *v.* Don, 63 Cal. 227, § 21.
Cavender *v.* Guild, 4 Cal. 250, § 1405.
Cayuga Bank *v.* Dill, 5 Hill, 403, § 954.
Cayuga County Bank *v.* Bennett, 5 Hill, 236, § 762.
v. Hunt, 2 Hill, 635, § 788.
Center *v.* P. & M. Bank, 22 Ala. 743, §§ 10, 342*a*.
Central Bank *v.* Allen, 16 Me. 41, § 1281.
v. Davis, 19 Pick. 373, § 955.
Central R'y Co. of Venezuela *v.* Kisch, 2 L. R. App. Ca. 112, § 7.
Central Savings Bank *v.* Shine, 48 Mo. 456, § 399.
Chadwick *v.* Turner, L. R. 10 Ch. 8; 1 Ch. App. Cas. 310, §§ 108, 217, 231.
Chaffee *v.* M. C. & N. W. R. Co. 64 Mo. 193, §§ 87, 956.
Chamberlain *v.* Bell, 7 Cal. 292, § 97.
v. Donahue, 44 Vt. 57, § 604.
v. Dow, 10 Mich. 319, § 490.
v. Faris, 1 Mo. 517, § 1084.
v. Godfrey, 36 Vt. 380, § 480*l*.
v. Preble, 11 Allen, 370, §§ 480*c*, 480*e*.
Chambers *v.* King Wrought Iron Bridge Co. 16 Kan. 270, § 1310.
Champlin *v.* Laytin, 6 Paige, 189, § 322.
Chandler *v.* Fulton, 10 Tex. 2, § 480.
v. Grieves, 2 H. Bl. 606, § 1404.
v. Mason, 2 Vt. 193, § 1028.
v. Spear, 22 Vt. 388, § 1117.
Chapcott *v.* Curlewis, 2 Moody & Rob. 484, § 915.
Chapman *v.* Annett, 1 Carr. & Kir. 552, § 967.
Chapman *v.* Colby, 47 Mich. 46, § 1405.
v. Holmes, 10 N. J. L. 20, § 480*c*.
v. Keane, 3 Ad. & El. 193, §§ 697, 703, 706.
v. Lipscombe, 1 Johns. 294, § 990.
v. Sims, 53 Miss. 154, § 316.
v. West, 17 N. Y. 125, §§ 341, 342*a*, 351.
Chapman Township *v.* Herrold, 58 Pa. St. 106, § 1412.
Charlotte *v.* Chouteau, 25 Mo. 465, § 1405.
Chase *v.* Hogan, 6 Bosw. 431, § 1330.
v. Sycamore & C. P. R. R. Co. 38 Ill. 215, § 1387.
Chatham *v.* Bradford, 50 Ga. 327, § 165.
Chaudron *v.* Magee, 8 Ala. 570, §§ 348, 362.
Cheeseborough *v.* Millard, 1 Johns. Ch. 409, § 203.
Cherry *v.* Baker, 17 Md. 75, §§ 1251, 1414.
Cheshire *v.* Taylor, 29 Ia. 492, § 956.
Chesterman *v.* Gardner, 5 Johns. Ch. 29, § 273.
Chew *v.* Barnet, 11 S. & R. 389, § 231.
v. Calvert, Walk. 54, § 308.
Chicago *v.* Langless, 66 Ill. 361, § 480*g*.
v. McCarthy, 75 Ill. 602, § 480*g*.
v. Witt, 75 Ill. 211, §§ 29, 206, 210.
Chicago & Alton R. R. Co. *v.* Scott, 42 Ill. 132, §§ 566, 572.
Chicago, etc. R. Co. *v.* Bensley, 69 Ill. 630, § 568.
v. Klauber, 9 Ill. App. 613, § 1409.
v. McCool, 26 Ind. 140, § 566.
Chicago, R. I. & P. R. Co. *v.* Kennedy, 70 Ill. 350, § 307.
Chicago & R. I. R. Co. *v.* Warren, 16 Ill. 502, § 574.
Chicago T. P. P. Co. *v.* Lowell, 60 Cal. 454, § 306.
Chick *v.* Pillsbury, 24 Me. 458, §§ 794, 805, 810, 822.
Chickering *v.* Failes, 26 Ill. 507, § 1354.
v. Fowler, 4 Pick. 371, § 563.
Childs *v.* Nelson, 7 Dana, 281, § 383.
v. Wyman, 44 Me. 433, § 87.
Chittenden *v.* Hobbs, 9 Ia. 417, §§ 1343, 1346, 1362.
Choteau *v.* Jones, 11 Ill. 300, § 196.

Chouteau *v.* Pierre, 9 Mo. 3, § 1405.
Christmas *v.* Mitchell, 3 Ired. Eq. 535, §§ 15. 308, 335.
Christy *v.* Horne, 24 Mo. 242, § 1281.
Church *v.* Barlow, 9 Pick. 547, § 715.
v. Gilmore, 1 Wood, 656, § 143*a*.
Churcher *v.* Guernsey, 39 Pa. St. 84, § 29.
Churchill *v.* Grove, 1 Ch. Cas. 35, §§ 240, 375.
Cicero, etc. Co. *v.* Craighead, 28 Ind. 274, § 1417.
Cincinnati *v.* Bickett, 26 Ohio St. 49, §§ 715, 1066.
Cincinnati, etc. R. Co. *v.* Pontius, 19 Ohio St. 221, §§ 555, 558.
Citizens' Bank *v.* Grafflin, 31 Md. 507, § 480*n*.
City Bank *v.* Cutter, 3 Pick. 514, § 1397.
City Council *v.* Montgomery, etc. Co. 31 Ala. 76, § 1410.
v. Page. 1 Speers' Eq. 159, § 7.
City N. B. *v.* Goodrich, 3 Colo. 137, § 87.
City Paying for Opening Streets, 20 La. An. 497, § 1123.
Clabaugh *v.* Byerly, 7 Gill, 354, § 208.
Clafflin *v.* Lenheim, 66 N. Y. 301, § 671.
Claflin *v.* Rosenberg, 42 Mo. 439, § 67.
Claggett *v.* Crall, 12 Kan. 393, § 96.
Claiborne *v.* Holmes, 51 Miss. 146, §§ 225, 303.
Clamorgan *v.* Lane, 9 Mo. 446, §§ 254, 255.
Clapp *v.* Rogers, 12 N. Y. 283, § 512.
Claridge *v.* Dalton, 4 M. & S. 226, § 1008.
Clare *v.* The State, 5 Ia. 286, § 1404.
Clark *v.* Adams, 33 Mich. 159, §§ 1355, 1395.
v. Baker, 11 Metc. 188, § 480*n*.
v. Bosworth, 51 Me. 528, § 277.
v. Commonwealth, 29 Pa. St. 129, § 1412.
v. Drake, 63 Mo. 354, § 25.
v. Faxton, 21 Wend. 153, § 552.
v. Fuller, 39 Conn. 238, § 679.
v. Helms, 1 Root, 486, § 348.
v. Keliher, 107 Mass. 406, § 640.
v. Lichtenberg, 33 Mich. 307, § 1320.
v. Remington, 11 Met. 361, § 389.
Clark *v.* Thayer, 105 Mass. 216, § 94*b*.
v. Trindle, 52 Pa. St. 492, § 246.
v. Wells, 45 Vt. 4, §§ 72, 74.
Clarke *v.* Courtney, 5 Pet. 319, § 280.
v. Crego, 47 Barb. 599, § 598.
v. Morey, 10 Johns. 69, § 752.
v. Sharpe, 3 M. & W. 166, § 926.
Clarkson *v.* Morgan, 6 B. Mon. 441, § 364.
Claudet *v.* Prince, 2 Q. B. 406, § 1173.
Clay *v.* Edgerton, 19 Ohio St. 549, §§ 420, 422.
v. Willan, 1 H. Blackst. 298, § 542.
Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555, § 1080.
Claycomb *v.* Munger, 51 Ill. 378, § 480*c*.
Claypole *v.* Houston, 12 Kan. 324, § 1035.
Clayton *v.* Blakey, 8 T. R. 3, § 586.
v. Hunt, 3 Camp. 27, § 539.
v. May, 67 Ga. 769, § 1410.
Clegg *v.* Cotton, 3 Bos. & Pul. 239, §§ 946, 947.
Clement *v.* Brooks, 13 N. H. 92, § 1229.
Clements *v.* Welles, L. R. 1 Eq. 200, §§ 15, 65*a*, 286, 307.
Clerks' Savings Bank *v.* Thomas, 2 Mo. App. 367, §§ 388, 662, 682.
Cleveland, etc. R. Co. *v.* Curran, 19 Ohio St. 1, § 558.
Clevinger *v.* Hill, 4 Bibb, 498, §§ 348, 357.
Clifton *v.* United States, 4 How. 242, § 1280.
Clode *v.* Bayley, 12 M. & W. 51, §§ 717, 735.
Clodfelter *v.* Cox, 1 Sneed, 330, §§ 433, 435, 436.
Clore *v.* Graham, 64 Mo. 249, § 49.
Clough *v.* Hoffman, 5 Wend. 499, § 1387.
Clymer's Lessee *v.* Dawkins, 3 How. 690, § 280.
Cobb *v.* Stokes, 8 East, 358, §§ 581, 595.
v. Wood, 32 Me. 455, § 1138.
Cobbett *v.* Brock, 20 Beav. 524, § 29.
Cobden *v.* Bolton, 2 Camp. 108, § 549.

Coble *v.* Nonemaker, 78 Pa. St. 501, § 50.
Cochran *v.* Bird, 2 Mo. 141, § 1211.
Cockey *v.* Milne's Lessee, 16 Md. 207, §§ 96, 112.
Cockrell *v.* Maney, 2 Tenn. Ch. 49, §§ 342*a*, 369.
Coffee *v.* Gates, 28 Ark. 43, §§ 1297, 1363.
Coffin *v.* Lunt, 2 Pick. 70, §§ 585, 607.
v. Ray, 1 Metc. 212, § 96.
Coffman *v.* Campbell, 87 Ill. 98, § 480*n*.
v. Wilson, 2 Metc. (Ky.) 542, § 94*a*.
Cogan *v.* Cook, 22 Minn. 137, § 188.
Colby *v.* Inhabitants of Westbrook, 57 Me. 181; 2 Am. Rep. 30, § 480*g*.
Coldwell *v.* Carrington, 9 Pet. 86, § 48.
Cole *v.* Allen, 51 Ind. 22, § 1353.
v. Goodwin, 19 Wend. 251, §§ 542, 543, 552, 558.
v. Wintercost, 2 Tex. 118, § 1397.
Coles *v.* Sims, 5 De G. M. & G. 1, § 50.
Coleman *v.* Barklew, 27 N. J. L. 357, § 288.
v. Carpenter, 9 Pa. St. 178, §§ 781, 783.
v. Dobbins, 8 Ind. 156, § 1404.
Coleman's Appeal, 75 Pa. St. 441, § 1315.
Colgin *v.* State Bank, 11 Ala. 222, § 1193.
Collier *v.* Baptist, etc. Soc. 8 B. Mon. 68, §§ 1408, 1409.
Colling *v.* Treweek, 6 B. & C. 394, § 1264.
Collingwood *v.* Irwin, 3 Watts, 306, § 480*l*.
Collins *v.* Canty, 6 Cush. 415, § 648.
v. New Eng. Iron Co. 115 Mass. 23, § 480*o*.
Colman *v.* Watson, 54 Ind. 65, § 49.
Colomer *v.* Morgan, 13 La. An. 202, §§ 149, 190.
Colt *v.* Barnard, 18 Pick. 260, §§ 738, 739.
v. Du Bois, 7 Neb. 394, § 96.
v. Miller, 10 Cush. 51, § 1397.
v. Root, 17 Mass. 229, § 1401.
Colquitt *v.* Thomas, 8 Ga. 258, § 11.
Columbet *v.* Pacheco, 46 Cal. 650, § 1215.
Colville, *In re*, 1 Montag. 110, § 450.
Colvin *v.* Rich, 3 Post. 175, § 434.
Colyer *v.* Finch, 5 H. & L. 905, §§ 13, 47.
Comer *v.* Jackson, 50 Ala. 384, § 1359.
Commercial Bank *v.* Clark, 28 Vt. 325, § 968.
v. Cunningham, 24 Pick. 270, §§ 272, 683*a*.
v. Gove, 15 La. 113, § 864.
v. Hughes, 17 Wend. 94, §§ 732, 943, 1003.
v. Strong, 28 Vt. 316, § 866.
Commercial Bank of Lake Erie *v.* Norton, 1 Hill, 501, § 653.
Commercial Bank of Rochester *v.* Colt, 15 Barb. 506, § 439.
Commonwealth *v.* Emery, 2 Gray, 80, § 1257.
v. Essinger, 1 Binn. (Pa.) 273, § 1262.
v. Goldstein, 114 Mass. 272, § 1261.
v. Intoxicating Liq. 13 Allen, 561, § 1175.
v. Maloy, 57 Pa. St. 291, § 480*n*.
v. Peckham, 2 Gray, 514, § 1416.
v. Powell, 11 Gratt. 828, § 87.
v. Railroad, 108 Mass. 7, § 558.
v. Rhodes, 6 B. Mon. 171, § 121.
Comstock *v.* Farnum, 2 Mass. 96, § 431.
v. Hier, 73 N. Y. 269, § 94*b*.
Condit *v.* Blackwell, 19 N. J. Eq. 193, § 1405.
Cone *v.* Baldwin, 12 Pick. 545, § 87.
Congar *v.* C. & N. W. R. R. Co. 24 Wis. 157, § 674.
Congdon *v.* Anderson, 30 Ill. 95, § 1233.
v. Reed, 7 R. I. 576, § 402.
Conn *v.* Penn, 1 Pet. C. Ct. 496, § 748.
Connecticut *v.* Bradish, 14 Mass. 296, §§ 203, 231*a*.
Connecticut River Bank *v.* French, 6 Allen, 313, § 527.
Conover *v.* Van Mater, 18 N. J. Eq. 481, § 316.
Connersville, Pres't & C. of, *v.* Woodleigh, 7 Blackf. 102, § 1254.
Contee *v.* Pratt, 9 Md. 73, § 1414.
Converse *v.* Warren, 4 Ia. 158, § 1348.
Cook *v.* Farren, 34 Barb. 95, § 1031.
v. Mancius, 5 Johns. Ch. 89, § 341.
v. Mutual Life Ins. Co. 53 Ala. 37, § 431.

Cook *v.* Tallman, 40 Ia. 133, § 1411.
v. Transwell, 2 Moore R. 513, § 1275.
v. Travis, 20 N. Y. 400; 22 Barb. 338, §§ 97, 205, 279, 299.
v. Wilson, 2 Jur. N. S. 1094; 1 C. B. N. S. 153, § 1410.
Cook's Lessees *v.* Kell, 13 Md. 469, §§ 118. 226.
Cooley *v.* Brayton, 16 Ill. 10, § 344.
Coolidge *v.* Charter Oak Life Ins. Co. 1 Mo. App. 109, § 673.
Cooper *v.* Bigley, 3 Mich. 463, § 203.
v. Reynolds, 10 Wall. 308, § 1057.
v. Smith, 25 Ia. 269, §§ 1084, 1137.
v. Watson, 10 Wend. 205, § 480*c*.
Cope *v.* Cordova, 1 Rawle, 203, § 563.
Copeland *v.* Directors of Mining Co. 33 Mich. 2, § 1138.
Copperthwaite *v.* Sheffield, 1 Sandf. 416, § 714.
Coppin *v.* Fernyhough, 2 Bro. Ch. 291, § 307.
Corbett *v.* Cantillon, 5 Ir. Ch. R. 126, § 104.
Corbin *v.* Sullivan, 47 Ind. 356, § 316.
Corbitt *v.* Clenny, 52 Ala. 480, §§ 307, 310.
Corby *v.* Butler, 55 Mo. 398, § 87.
Cordeviolle, Succession of, *v.* Dawson, 26 La. An. 534, §§ 147, 149.
Cordova *v.* Hood, 17 Wall. 1, § 65*a*.
Corn *v.* Sims, 3 Met. (Ky.) 391, §§ 103, 267.
Cornall *v.* Duvall, 22 Ark. 136, § 143*a*.
Cornelius *v.* Partain, 39 Ala. 473, § 1241.
Corning *v.* Whyte, 2 Paige, 567, §§ 342*a*, 353.
Cornoy *v.* Da Costa, 1 Esp. 303, § 946.
Corp *v.* McComb, 1 Johns. Cas. 328, § 781.
Corpman *v.* Baccastow, 84 Pa. St. 363, §§ 187, 188, 297.
Corwin *v.* Merritt, 3 Barb. 341, §§ 1075, 1130.
Corey *v.* Cinn. etc. R. Co. 5 Ia. 357, § 1405.
Cory *v.* Eyre, 1 De G. J. & S. 149, §§ 48, 65*a*.
v. Scott, 3 B. & Ald. 619, § 1004.
Cosser *v.* Collinge, 3 My. & K. 283, § 321.
Coster *v.* Bank of Ga. 24 Ala. 37, § 225.
v. Thomason, 19 Ala. N. S. 717, § 752.
Cotton *v.* Hart, 1 A. K. Marsh. 56, § 8.
Coulter *v.* Morgan's Adm'rs, 12 B. Mon. 278, § 480*m*.
County of Green *v.* Bledsoe, 12 Ill. 267, §§ 1226, 1253.
Course *v.* Shackleford, 2 Nott & McC. 283, § 738.
Cove *v.* Cove, L. R. 15 Ch. Div. 639, § 690.
Coveny *v.* Hale, 49 Cal. 552, §§ 1190, 1201.
Cover *v.* Black, 1 Barr, 493, § 96.
Covington *v.* Shepherd, 20 How. 227, § 1404.
Cox *v.* Coventon, 31 Beav. 378, §§ 15, 34, 321.
v. Mathews, 17 Ind. 367, § 1139.
v. Milner, 23 Ill. 476, §§ 7, 264.
v. Strode, 2 Bibb, 273, § 480*c*.
Coy *v.* Coy, 15 Minn. 119, §§ 96, 323, 328.
Crabb *v.* Atwood, 10 Ind. 331, § 1075.
Crabtree *v.* Breckenridge, 48 Ill. 91, § 65*a*.
Craft *v.* Isham, 13 Conn. 28, §§ 390, 418, 419.
Craft's Appeal, 42 Conn. 146, §§ 90, 91.
Craig *v.* Craig, 5 Rawle, 91, § 480*m*.
v. Hawkins, Hard. (Ky.) 46, § 1138.
Cram *v.* Sherburne, 14 Me. 48, § 956.
Crandell *v.* Vickery, 45 Barb. 156, § 92*a*.
Crane *v.* Turner, 7 Hun, 357; 67 N. Y. 437, § 113.
Crassen *v.* Swoveland, 22 Ind. 427, §§ 244, 246, 297.
Crawford *v.* Clark, 15 Ill. 561, § 564.
v. Milligan, 2 Cranch C. C, 226, § 820.
Crayton *v.* Clark, 11 Ala. 787, § 434.
Credland *v.* Potter, 18 Eq. Cas. 350; L. R. 10 Ch. 8, §§ 110, 231.
Cregler *v.* Durham, 9 Ind. 375, § 495.
Cremer *v.* Higginson, 1 Mason, 323, §§ 389, 401, 529.

Crittenden *v.* Woodruff, 11 Ark. 82, § 1228.
Crocker *v.* Crocker, 31 N. Y. 507, §§ 67, 68.
v. Dunkin, 6 Blackf. 533, § 1159.
v. Getchell, 23 Me. 392, § 706.
v. Gilbert, 9 Cush. 131, § 1401.
v. Gullifer, 44 Me. 491, § 72.
Crocket *v.* Maguire, 10 Mo. 34, §§ 205, 207, 213.
Crofton *v.* Ormsby, 2 Sch. & L. 583, §§ 52, 279, 286, 303.
Crofut *v.* Wood, 3 Hun, 571, § 209.
Croix *v.* Sibbert, 15 Pa. St. 238, § 94*a*.
Cromwell *v.* County of Sac. 6 Cent. L. J. 209 (U. S.), 1877, § 62.
Crook *v.* Jadis, 5 B. & A. 909, §§ 80, 82.
Crooker *v.* Appleton, 25 Me. 131, § 1254.
Crosby *v.* Houston, 1 Tex. 203, § 192.
Croskey *v.* Chapman, 26 Ind. 333, § 307.
Cross *v.* Bell, 34 N. H. 82, § 1280.
v. Smith, 1 M. & S. 545, § 743.
Crossly *v.* Ham, 13 East, 498, § 94.
Crouise *v.* Kellogg, 20 Ill. 11, § 94*a*.
Crow *v.* Robinson, L. R. 3 C. P. 264, § 434.
Crowell *v.* Davis, 12 Met. 293, § 1138.
v. Galloway, 3 Neb. 215, § 1366.
Crowther *v.* Rowlandson, 27 Cal. 276, § 1201.
Culler *v.* Motzer, 13 S. & R. 358, § 280.
Culpepper *v.* Aston, 12 Ch. Cas. 115, § 338.
Culver *v.* Felt, 4 Rob. (N. Y.) 681, § 1169.
v. Rhodes, 87 N. Y. 354, § 280.
Cummings *v.* Stone, 13 Mich. 70, § 1410.
Cunningham *v.* Buckingham, 1 Ohio, 264, §§ 225, 273.
v. Pattee, 99 Mass. 248, §§ 274, 286, 303.
v. Southern Ex. Co. 67 N. C. 425, § 1307.
v. Warnekey, 61 Cal. 507, § 1217.
Cupples *v.* Wheelan, 61 Mo. 583, § 669.
Curran *v.* Shattuck, 24 Cal. 427, § 343.
Currens *v.* Hart, Hardin, 37, § 27.
Currier *v.* Baker, 2 Gray, 224, § 632.
Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360, § 781.
Curtis *v.* Blair, 4 Cush. 309, §§ 10, 29, 35.
v. Leavitt, 15 N. Y. 194, § 676.
v. Lyman, 24 Vt. 338, §§ 165, 172.
v. Marsh, 4 Jur. N. S. 1112, § 1410.
v. Mundy, 3 Metc. 405, §§ 7, 9, 246, 275.
v. Sacramento, 64 Cal. 102, § 1138.
v. State Bank, 6 Blackf. 312, §§ 852, 1397.
Cushing *v.* Ayer, 25 Me. 383, § 97.
v. Hurd, 4 Pick. 252, § 236.
Custer *v.* Tompkins County Bank, 9 Pa. St. 27, § 683*a*.
Cutler *v.* Caruthers, 48 Cal. 178, § 1414.
Cutler *v.* Wright, 22 N. Y. 472, § 1405.
Cuyler *v.* Ferrill, 1 Abb. 169, § 1411.

D.

Dabney *v.* Stidger, 4 Sm. & M. 749, § 755.
Daggett *v.* Whiting, 35 Conn. 372, § 94*a*.
Daily *v.* State, 10 Ind. 536, § 1404.
Dale *v.* Kimpton, 46 Vt. 76, § 436.
v. Wilson, 16 Minn. 525, § 1406.
Daly *v.* Slatter, 4 Carr. & P. 200, § 817.
Dambmann *v.* White, 48 Cal. 439, §§ 1201, 1240.
Dana *v.* Boyd, 2 J. J. Marsh. 587, § 1269.
v. Conant, 30 Vt. 246, § 1266.
Danforth *v.* Dart, 4 Duer, 101, § 10.
Daniels *v.* Davidson, 16 Ves. 249, §§ 53, 278, 279, 282, 303.
v. Sorrells, 9 Ala. 436, § 96.
Dann *v.* Spurrier, 7 Ves. 231, § 65*a*.
Danville, etc. Co. *v.* State, 16 Ind. 456, § 1408.
Darbishire *v.* Parker, 6 East, 3, §§ 794, 824.
Dargin *v.* Beeker, 10 Ia. 571, §§ 96, 310.
Darlington *v.* Commonwealth, 41 Pa. St. 68, §§ 1126, 1127.
Darrance *v.* Preston, 18 Ia. 396, § 1352.
Dasher *v.* Dasher, 47 Ga. 320, § 1379.
Daubenspeck *v.* Platt, 22 Cal. 330, §§ 281, 294.

Davant *v.* Carleton, 53 Ga. 491, § 1380.
Davenport *v.* Gilbert, 4 Bosw. 532, §§ 836, 861, 864.
v. Woodbridge, 8 Me. 17, § 440.
Davidson *v.* Graham, 2 Ohio St. 131, § 553.
Davidson *v.* Petticolas, 34 Tex. 27, § 1414.
Davies *v.* Hopkins, 15 Ill. 519, § 273.
v. Sear, L. R. 7 Eq. 427, §§ 23, 65*a*.
v. Thomas, 2 Young & C. Exch. 234, § 307.
Davis *v.* Bank of Fulton, 31 Ga. 69, § 1404.
v. Barr, 9 S. & R. 137, § 431.
v. Best, 2 Ia. 96, § 1412.
v. Bigler, 62 Pa. St. 241, § 8.
v. Blunt, 6 Mass. 487, § 278.
v. Burt, 7 Ia. 56, §§ 1346, 1362, 1369.
v. Davis, 48 Vt. 502, § 1252.
v. D. & M. R. R. Co. 20 Mich. 105, § 674.
v. Duffle. 1 Abb. App. Dec. 486, § 1317.
v. Earl of Strathmore, 16 Ves. 419, §§ 231*a*, 240.
v. Francisco, 11 Mo. 572, § 739.
v. Hanley, 12 Ark. 645, §§ 805, 809.
v. Keyes, 38 N. Y. 94, § 499.
v. McCready, 17 N. Y. 280, § 94*a*.
v. Ownsby, 14 Mo. 170, § 239.
v. Patty. 42 Miss. 509, § 1374.
v. Planters' Bank, 1 S. & M. 261, § 812.
v. Wilbourne, 1 Hill, S. C. 28, § 480*d*.
v. Willan, 2 Stark. 279, § 538.
v. Williams, Peck (Tenn.), 191, § 919.
v. Williams, 16 Q. B. 546, § 480*h*.
Davis, Jackson *ex dem. v.* Bronson, 4 Cow. 51, § 1178.
Davis Sewing Machine Co. *v.* Jones, 61 Mo. 409, §§ 395, 400, 1389.
Dawson *v.* Danbury Bank, 15 Mich. 489, §§ 281, 294, 299.
v. Dawson, Rice Eq. 243, § 101.
v. Goodyear, 43 Conn. 548, § 94*b*.
v. Kittle, 4 Hill, 107, § 480*n*.
v. Prince, 2 D. & J. 41, § 10.
Day *v.* Clark, 25 Vt. 397, § 200.
Day *v.* Newark India Rubber Co. 1 Blatchf. 628, § 1306.
v. Walmsley, 33 Ind. 145, § 688.
v. Zimmerman, 68 Pa. St. 72, § 372.
Daylight Burner Co. *v.* Odlen, 51 N. H. 56; 12 Am. Rep. 45. § 652.
Dean *v.* Border, 15 Tex. 298, § 1268.
Dearing *v.* Watkins, 10 Ala. 20, § 231.
Dearle *v.* Hall, 3 Russ. 1, § 433.
Deason *v.* Taylor, 53 Miss. 697, §§ 307, 230.
Debell *v.* Foxworthy, 9 B. Mon. 228, § 359.
Debuys *v.* Mollere, 3 Mart. N. S. 318, § 956.
De Celis *v.* United States, 13 Ct. of Cl. 117, § 1411.
Deering *v.* Flanders, 49 N. H. 225, § 494.
Deford *v.* Reynolds, 36 Pa. St. 325, §§ 483, 494.
Deitrich *v.* Lang, 11 Kan. 636, § 1045.
Delacroix *v.* Cenas, 20 Mart. (La.) 356, § 480*c*.
De Lane *v.* Moore, 14 How. 253, § 224.
Delano *v.* Jopling, 1 Litt. 117, § 1405.
Delogney *v.* Smith, 3 La. 518, § 1113.
Delong *v.* Brainard, 2 Thomp. & C. 1, §§ 1212, 1213.
Den *v.* Adams, 12 N. J. L. 99, §§ 581, 596.
v. Bennett, 4 Ired. (N. C.) 122, § 600.
v. Mackay, 2 N. J. L. 419, § 588.
v. McIntosh, 4 Ired. 291, § 607.
Denn *v.* Rawlins, 10 East, 261, § 600.
Dennis *v.* Barbour, 6 S. & R. 420, § 1258.
v. Burrett, 6 Cal. 670, §§ 97, 208.
v. Morrice, 3 Esp. 158, § 945.
Denniston *v.* Bacon, 10 Johns. 198, § 94*b*.
v. Imbrie, 3 Wash. C. Ct. 396, § 748.
Denny *v.* Cabot, 6 Metc. 82, § 525.
v. Palmer, 5 Ired. 610, §§ 946, 991.
Denster *v.* McCamus, 14 Wis. 307, § 203.
De Ruyter *v.* Trustees, etc. 2 Barb. Ch. 556, §§ 97, 103.

Deshon *v.* Fosdick, 1 Woods, 286, § 382.
Despau *v.* Swindler, 3 Mart. N. S. 705, § 1413.
Detroit *v.* Blakely, 21 Mich. 84, § 280*g*.
Dettmar *v.* Metropolitan, etc. Bank, 1 H. & M. 641. § 10.
Develing *v.* Ferris, 18 Ohio, 170, §§ 943, 944.
De Vendal *v.* Malone, 25 Ala. 272, § 225.
Dewey *v.* Littlejohn, 2 Ired. Eq. 495, § 245.
Dewitt *v.* Moulton, 17 Me. 418, §§ 112, 125.
Dewes *v.* Colorado Co. 32 Tex. 570, § 1412.
Dews *v.* Olevill, 3 Baxt. 432, § 436.
Dey *v.* Dunham, 2 Johns. Ch. 182, §§ 186, 244.
De Yampert *v.* Brown, 28 Ark. 166, § 207.
Diamond *v.* Lawrence Co. Bank, 1 Wright, 353, § 371.
Dicken *v.* Hall, 87 Pa. St. 379, § 829.
Dickens *v.* Beal, 10 Pet. 572, §§ 829, 1001, 1004, 1005.
Dickenson *v.* Breeden, 30 Ill. 279, § 1404.
v. Glenny, 27 Conn. 104, § 113.
Dickerson *v.* Campbell, 32 Mo. 544, § 45.
Dickey *v.* Lyon, 19 Ia. 544, §§ 284, 286.
Dickinson *v.* Dickinson, 25 Gratt. 321, § 515.
v. Hall, 14 Pick. 217, § 94*a*.
Diehl *v.* Page, 3 N. J. Eq. 143, §§ 44, 65*a*.
Digman *v.* McCollum, 47 Mo. 372, §§ 113, 118, 205, 214.
Dill *v.* Camp, 22 Ala. 249, § 1253.
Dimon *v.* Dunn, 15 N. Y. 498, § 208.
Disbrow *v.* Jones, Harring. Ch. 48, § 281.
Distilled Spirits, The, 11 Wall. 356, §§ 672, 677, 687, 689, 690.
Division of Howard Co. 15 Kan. 194, § 1404.
Dix *v.* Cobb, 4 Mass. 508, §§ 434, 436.
v. Flanders, 1 N. H. 246, § 1390.
Dixon *v.* Doe, 1 Sm. & M. 70, §§ 235, 246, 273, 278.
v. Dunham, 14 Ill. 324, § 576.
v. Frazer, 1 E. D. Smith, 32, § 391.
Dixon *v.* La Coste, 1 Sm. & M. 107, § 373.
v. Nichols, 39 Ill. 372, § 1415.
Dobbin *v.* Bradley, 17 Wend. 422, § 399.
Dobree *v.* Eastwood, 3 Carr. & P. 250, § 795.
Dodd *v.* Atkinson, Com. Dig. Pl. C. 75, § 1391.
v. Bratt. 1 Minn. 270, § 434.
Dodds *v.* Hills, 2 H. & M. 424, §§ 11, 34.
Dodge *v.* Bank of Kentucky, 2 A. K. Marsh. 610, § 757.
v. Coffin, 15 Kan. 277, § 1405.
v. Favor, 15 Gray, 82, § 480*n*.
v. Potter, 18 Barb. 193, § 171.
Doe *v.* Allsop, 5 B. & Add. 142, § 231.
v. Archer, 14 East, 245, § 639.
v. Baker, 2 Dev. 270, § 593.
v. Bank of Cleveland, 3 McLean, 140, § 225.
v. Bell, 5 T. R. 471, § 586.
v. Brown, 8 Blackf. 443, § 1253.
v. Calvert, 2 Camp. 387, § 649.
v. Chaplin, 3 Taunt. 120, § 616.
v. Crick, 5 Esp. 196, § 627.
v. Goldwin, 1 G. & D. 463; 2 Ad. & El. 143, §§ 619, 701.
v. Hazell, 1 Esp. 94, § 611.
v. Howard, 11 East, 498, § 612.
v. Hulme, 2 Mann. & Ry. 433, § 617.
v. Lea, 11 East, 312, § 609.
v. Martin, 1 M. & Rob. 242, § 1290.
v. Miller, 2 Carr. & P. 348, § 609.
v. Milward, 3 M. & W. 328, § 645.
v. Mizen, 2 Mood. & R. 56, § 620.
v. Murless, 6 M. & S. 110, § 626.
v. Porter, 3 T. R. 13, § 607.
v. Quigley, 2 Camp. 505, § 594.
v. Read, 12 East, 57, § 623.
v. Robinson, 3 Bing. N. C. 677, § 621.
v. Sayer, 3 Camp. 8, § 593.
v. Scott, 6 Bing. 362, §§ 607, 611, 634.
v. Spence, 6 East, 120, § 612.
v. Spitty, 3 Barn. & Ad. 182, § 1288.
v. Stennett, 2 Esp. 716, § 581.
v. Summersett, 1 B. & Ad. 135, § 616.
v. Sweetser, 2 Ind. 649, § 1121.

Doe *v.* Walters, 10 B. & C. 626, §§ 619, 701.
v. Watkins, 7 East, 551, §§ 612, 627.
v. Watts, 7 D. & E. 83, §§ 581, 595.
v. Wilkinson, 12 Ad. & El. 743, § 638.
v. Williams, 6 B. & C. 41, § 626.
v. Woodman, 8 East, 228, § 628.
v. Wrightman, 4 Esp. 5, § 629.
Dogan *v.* Dubois, 2 Rich. Eq. 85, § 94*a*.
Doherty *v.* Perry, 38 Ind. 15, § 94*a*.
Dole *v.* Thurlow, 12 Metc. 157, § 96.
v. Young, 24 Pick. 250, §§ 413, 425, 426.
Dolin *v.* Gardner, 15 Ala. 758, § 205.
Dolman *v.* Orchard, 2 Carr. & P. 104, § 483.
Donaldson *v.* Donaldson, Kay, 711, § 430.
v. Means, 4 Dall. 109, §§ 956, 975.
Donath *v.* Broomhead, 7 Pa. St. 301, § 469.
Donley *v.* Camp, 22 Ala. 659, § 398.
Donnelly *v.* Howie, Hayes & J. 436, §§ 956, 966.
Dooley *v.* Wolcott, 4 Allen, 406, §§ 14, 245, 274.
Doolittle *v.* Cook, 75 Ill. 354, §§ 203, 210.
Doon *v.* Donaher, 113 Mass. 151, § 1276.
Dorchester *v.* New Eng. Bank, 1 Cush. 177, § 480*o*.
Dorsey *v.* Hall, 7 Neb. 465, § 96.
v. Watson, 14 Mo. 59, §§ 972, 975.
Doswell *v.* Buchanan, 3 Leigh, 365, §§ 97, 103, 214.
Douglass *v.* Howland, 24 Wend. 35, §§ 388, 395, 401.
v. McCrackin, 52 Ga. 596, § 339.
v. Ray, 4 Durnf. & East, 552, § 1201.
v. Reynolds, 7 Pet. 113, §§ 392, 406, 407.
v. Scott, 8 Leigh, 43, § 87.
Dow *v.* N. J. Steam Co. 11 N. Y. 485, § 553.
v. Sayward, 12 N. H. 271, § 525.
v. School Dist. 46 Vt. 108, § 1312.
Dowle *v.* Saunders, 2 Hem. & Mill. 242, § 56.
Down *v.* Rice, 11 Wend. 178, § 1177.
Downer *v.* Garland, 21 Vt. 362, § 348.
v. Remer, 21 Wend. 20, §§ 902, 904.
Downs *v.* Planters' Bank, 1 Sm. & M. 261, § 805.
Doyle *v.* Bradford, 90 Ill. 416, § 1411.
v. Gibbs, 6 Lans. 180, § 601.
v. Peerless, etc. Co. 44 Barb. 239, § 214.
v. Stevens, 4 Mich. 87, §§ 96, 208, 273, 276.
v. Teas, 5 Ill. 202, §§ 7, 13, 113, 307, 601.
Drake *v.* Crowell, 40 N. J. L. 58, § 351.
v. Flewellen, 33 Ala. 106, § 1408.
v. Hale, 38 Mo. 346, § 1037.
Draper *v.* Draper, 59 Ill. 119, § 1332.
v. Weld, 13 Gray, 580, § 87.
Dresser *v.* Missouri, etc. R. Co. 93 U. S. 93, § 93.
v. Norwood, 17 C. B. N. S. 466, § 687.
v. Wood, 15 Kan. 344, § 348.
Drew *v.* Lord Norbury, 3 Jones & L. 267, § 104.
v. Towle, 27 N. H. 412, § 94*a*.
Driscoll, *In re*, 1 I. R. Eq. 285, § 104.
Drinkwater *v.* Tebbetts, 17 Me. 16, § 936.
Dronillard *v.* Whistler, 29 Ind. 552, §§ 1037, 1041, 1057.
Drummond *v.* Prestman, 12 Wheat. 515, § 405.
Dryden *v.* Frost, 3 M. & C. 670, §§ 47, 56, 690.
Drysdale *v.* Mace, 2 Sm. & Gif. 225, § 321.
Dubois *v.* Barker, 4 Hun, 80, §§ 25, 26.
v. Hermance, 56 N. Y. 673, § 480*m*.
Duchess of Kingston's Case, 2 Smith Lead. Cas. 705 (7 Am. ed.), § 214.
Ducoway *v.* Galt, 20 Ark. 190, § 96.
Dudley *v.* Witter, 46 Ala. 664, §§ 307, 328.
Duff *v.* Budd, 3 Brod. & Bing. 177, § 560.
Duffield *v.* Scott, 3 T. R. 374, § 418.
Dugard *v.* Edwards, 50 Barb. 289, § 480*n*.

Duggan *v.* King, Rice, 1239, § 994.
Duke *v.* Bohm, 16 Minn. 306, § 679.
Dunbar *v.* Brown, 4 McLean, 166, § 390.
v. Fredennick, 2 Ba. & Be. 310, § 48.
v. Rawles, 28 Ind. 225, § 72.
v. Tyler, 44 Miss. 1, § 985.
Duncan *v.* Jaudon, 15 Wall. 165, § 683*b*.
v. Matney, 29 Mo. 368, § 1089.
Duncan & Sherman *v.* Gilbert. 29 N. J. L. 521, § 94*b*.
Dungan *v.* Am. Ins. Co. 52 Pa. St. 253, § 96.
v. Miller, 37 N. J. L. 182, § 1358.
Dunham *v.* Dey, 15 Johns. 555, §§ 244, 246.
Dunks *v.* Fuller, 32 Mich. 242, § 278.
Dunlap *v.* Higgins, 1 H. L. Cas. 381, § 383.
v. Wilson, 32 Ill. 517, §§ 273, 278, 288, 689.
Dunn *v.* Games, 1 McLean, 321. § 348.
v. Weston, 71 Me. 270, § 94*b*.
Dunning *v.* Foster, 42 N. H. 165. § 1222.
v. Smith, 3 Johns. Ch. 344, § 660.
Durbin *v.* Waldo, 15 Wis. 532, § 1206.
Durden *v.* Smith, 44 Miss. 548, § 984.
Durham *v.* Price, 5 Yerg. 300, § 732.
Durrossett *v.* Hale, 38 Mo. 346, § 1057.
Duryee *v.* Dennison, 5 Johns. 248, § 975.
Dutch, etc. Co. *v.* Mooney, 12 Cal. 534, § 1408.
Dutton *v.* Warschauer, 21 Cal. 609, §§ 65*a*, 373.
Duxbury *v.* Vermont, etc. R. Co. 26 Vt. 751, § 480*m*.
Dwight *v.* Emmerson, 2 N. H. 159, § 738.
v. Scoville, 2 Conn. 654, § 1021.
Dyer *v.* Flint, 21 Ill. 80, §§ 1412, 1413.
v. Hargrave, 10 Ves. 506, § 65*a*.
v. Pearson, 3 B. & C. 38, § 653.

E.

Eagle Bank *v.* Chapin, 3 Pick. 180, § 1281.
v. Hathaway, 5 Metc. 212, §§ 717, 914.
Earl *v.* McVeigh, 91 U. S. 503, § 1350.
v. Van Alstine, 8 Barb. 630, § 480*i*.
Earl of Lonsdale *v.* Nelson, 2 B. & C. 302, § 480*h*.
Early *v.* Doe, 16 How. 610, §§ 1106, 1116.
East *v.* Thoroughgood, 1 Croke, 834, § 1387.
East Saginaw & St. Clair R. R. Co. *v.* Benham, 28 Mich. 459, § 1127.
East Tennessee *v.* Gaskell, 2 Lea (Tenn.), 742, § 1404.
Eastbrook *v.* Eastbrook, 64 Barb. 421, § 1033.
Eastman *v.* Amoskeag Manf. Co. 44 N. H. 143, § 1280.
v. Bennett, 6 Wis. 232, § 1226.
v. Crosby, 8 Allen, 206, § 1405.
v. Little, 5 N. H. 290; 4 Hill, 92, §§ 1109, 1110.
v. Thurman, 24 Cal. 379, § 737.
Ebner *v.* Goundes, 5 Watts & S. 49, § 96.
Eck *v.* Hatcher, 58 Mo. 235, §§ 10, 24.
Eddy, The, 5 Wall. 481, §§ 569, 577*a*.
Edmeston *v.* Lyde, 1 Paige, 637, §§ 342*a*, 353.
Edminster *v.* Higgins, 6 Neb. 269, § 96.
Edmons *v.* Torrence, 48 Ala. 38, § 316.
Edmonston *v.* Drake, 5 Pet. 624, § 408.
Edwards *v.* Banksmith, 35 Ga. 213, § 341.
v. Cahawba, 14 La. An. 224, § 541.
v. Martin, L. R. 1 Eq. 121, § 433.
v. McFall, 5 La. An. 167, § 494.
v. Morris, 2 A. K. Marsh. 65, § 48.
v. Thomas, 2 Mo. App. 282, §§ 88, 662, 682.
v. Thompson, 71 N. C. 177, §§ 246, 273, 278, 286.
v. Trumbull, 50 Pa. St. 509, § 187.
Ehle *v.* Brown, 31 Wis. 404, § 296.
Eichelberger *v.* Finley, 7 Harr. & J. 381, § 1009.
Eisenhart *v.* Slaymaker, 14 S. & R. 153, § 1281.
Elee *v.* Wait, 28 Ill. 70, §§ 1063, 1140.
Eldridge *v.* Walker, 80 Ill. 270, § 358.

Ellershaw *v.* Magniac, 6 Exch. 570, § 477.
Ellis *v.* Jaszynsky, 5 Cal. 444, § 1221.
v. Kreutzinger, 27 Mo. 311, § 438.
v. Lull, 45 N. H. 419, § 1245.
v. Paige, 2 Pick. 71, §§ 585, 607.
v. Reddin, 12 Kan. 306, § 1412.
Elliott *v.* Eddins, 24 Ala. 509, § 1101.
v. Stone, 12 Cush. 174, § 635.
Ellsassar *v.* Hunter, 26 Cal. 279, § 1329.
Ellsworth *v.* Moore, 5 Ia. 286, § 1414.
Elsey *v.* Lutyens, 8 Hare, 159, § 260.
Elwood *v.* Deifendorf, 5 Barb. 412, § 480*m*.
v. Flannigan, 104 U. S. 562, § 1404.
Ely *v.* Wilcox, 20 Wis. 523, §§ 203, 210, 288.
Embury *v.* Conner, 2 Sandf. 98, § 205.
Emeric *v.* Alverado, 64 Cal. 529, § 1201.
Emery *v.* Gas Co. 28 Cal. 345, § 1123.
Emmett *v.* Butler, 7 Taunt. 599, § 486.
Emmons *v.* Murray, 16 N. H. 385, §§ 273, 274, 278.
v. Scudder, 115 Mass. 367, § 603.
Empire Bank, *In re*, L. R. 5 Ch. 358, § 674.
Empire T. Co. *v.* Oil Co. 63 Pa. St. 14, § 558.
English *v.* Waples, 13 Ia. 570, § 97.
Epley *v.* Witherow, 7 Watts, 163, §§ 10, 29, 30, 279.
Erie, etc. Transp. Co. *v.* Dater, 8 Cent. L. J. 293, § 548.
Erickson *v.* Rafferty, 79 Ill. 209, §§ 27, 185.
Erskine *v.* Steamboat Thames, 6 Mo. 371, § 573.
Esdaile *v.* Sowerby, 11 East, 114, § 991.
Espin *v.* Pemberton, 3 De G. & J. 547, §§ 35, 56, 65*a*, 674.
Espy *v.* Lake, 10 Ha. 260, § 10.
Essex *v.* Baugh, 1 Y. & C. Ch. 620, § 260.
Estate of Leiman, 32 Md. 225, § 225.
Estate of Palomeres, 63 Cal. 402, § 1136.
Esterbrook Steel Pen Co. *v.* Ahern, 3 N. J. Eq. 341, § 1414.
Estrella, The, 4 Wheat. 298, § 1413.
Etherington *v.* Parrot, 1 Salk. 118, § 671.
Etting *v.* Schuylkill Bank, 2 Pa. St. 355, §§ 797, 840.
Eureka, etc. Co. *v.* Sup. Ct. etc. 5 W. Coast Rep. 179, § 1140.
Evans *v.* Bicknell, 6 Ves. Jr. 173, § 56.
v. Drummond, 4 Esp. 89, §§ 486, 490.
v. Evans, 9 Paige, 178, § 724.
v. Kymer, 1 Barn. & Ad. 528, § 94*b*.
v. Sweet, Ry. & M. 83, § 1273.
Evansville, etc. R. Co. *v.* Androscoggin Mills, 22 Wall. 594, § 554.
v. Smith, 65 Ind. 92, § 1417.
v. Young, 28 Ind. 516, § 553.
Everett *v.* Saltus, 15 Wend. 474, §§ 653, 669.
Ewart *v.* Cochrane, 4 Macq. 117, § 65*a*.
Ewing *v.* Higby, 67 Ohio, 343, § 1160.
Exch. & Banking Co. *v.* Boyce, 3 Rob. (La.) 307, § 905.
Eyre *v.* McDonald, 9 H. L. Cas. 619, §§ 240, 434.

F.

Fabyan *v.* Russell, 38 N. H. 84, § 1410.
Fagg *v.* Clements, 16 Cal. 389, § 1161.
Fair *v.* Stevenot, 29 Cal. 486, §§ 96, 274.
Faircloth *v.* Jordan, 18 Ga. 350, § 214.
Falconer *v.* Montgomery, 4 Dall. 432, § 1138.
Fall River Bank *v.* Sturtevant, 12 Cush. 372, § 683*b*.
Fallas *v.* Pierce, 30 Wis. 443, §§ 203, 231*a*.
Fall's National Bank *v.* Townsley, 102 Mass. 177, § 910.
Fancher *v.* De Montegre, 1 Head, 40, § 1412.
Fant *v.* Miller, 17 Gratt. 187, § 1237.
Fanton *v.* Fairfield Co. Bank, 23 Conn. 485, § 432.
Farmer *v.* Stewart, 2 N. H. 97, § 1141.
Farmers' Bank *v.* Bank of Pa. 7 Watts & S. 335, § 136.
v. Duvall, 7 Gill & J. 78, § 809.
v. Vail, 21 N. Y. 485, § 819.

Farmers' Bank *v.* Vanmeter, 4 Rand. 553, § 1004.
v. Waples, 4 Harr. (Del.) 429, § 939.
Farmers' Bank of Va. *v.* Gunnel, 26 Gratt. 131, § 985.
Farmers', etc. Bank *v.* Noxon, 45 N. Y. 762, § 94*b*.
Farmers' & Citizens' Bank *v.* Payne, 25 Conn. 444, §§ 683, 683*a*.
Farmers' & Mechanics' Bank *v.* Champlain Tr. Co. 23 Vt. 186, §§ 552, 553.
v. Champlain Tr. Co. 16 Vt. 52, §§ 575, 576.
v. Kircheval, 2 Mich. 504, §§ 402, 418.
Farmers' & Merchants' Bank *v.* Lonergan, 21 Mo. 46, § 1257.
Farmers' Loan, etc. Co. *v.* Maltby, 8 Paige, 361, §§ 205, 276.
Farmers' National Bank *v.* Fletcher, 44 Ia. 252, § 348.
Farnham *v.* Campbell, 10 Paige, 598, §§ 342*a*, 353.
v. Railroad, 55 Pa. St. 53, § 553.
Farnsworth *v.* Childs, 4 Mass. 637, §§ 8, 231, 278.
Farnum *v.* Towle, 12 Mass. 92, § 991.
Farquarson *v.* Eichelberger, 15 Md. 63, § 115.
Farrar *v.* Bates, 55 Tex. 193, § 1414.
v. Eastman, 10 Me. 191, § 1112.
Farrell Foundry *v.* Dart, 26 Conn. 376, § 683.
v. Jones, 63 Cal. 194, § 1202.
Farrington *v.* Woodward, 82 Pa. St. 259, §§ 672, 674.
Farrow *v.* Rees, 4 Beav. 18, § 30.
Fassin *v.* Hubbard, 55 N. Y. 471, § 743.
Faulk *v.* Faulk, 23 Tex. 635, § 1404.
Faull *v.* Tinsman, 36 Pa. St. 108, § 431.
Fauntleroy *v.* Hannibal, 1 Dill. 118, § 1404.
Faust *v.* Smith, 23 N. Y. 252, § 279.
Fay *v.* Jones, 18 Barb. 340, § 432.
Fegenbush *v.* Lang, 28 Pa. St. 193, § 426.
Feilden *v.* Slater, L. R. 7 Eq. 523, § 286.
Feise *v.* Wray, 3 East, 93, § 477.
Feltham *v.* Clarke, 1 De G. & Sm. 307, § 433.
Felton *v.* Pitman, 14 Ga. 530, § 207.
Fenner *v.* Buffalo & State Line R. Co. 44 N. Y. 505, §§ 573, 576.
Fenno *v.* Sayre, 3 Ala. 458, §§ 205, 210.
Fenwick *v.* Macy, 2 B. Mon. 469, § 362.
Ferdinand *v.* State, 39 Ala. 706, § 1411.
Ferrars *v.* Cherry, 2 Vern. 383, §§ 46, 51.
Ferrea *v.* Chabot, 63 Cal. 564, § 374.
Ferrier *v.* Buzick, 6 Ia. 258, §§ 347, 357.
Fetters *v.* Muncie National Bank, 34 Ind. 251, §§ 94*a*, 94*b*.
Feurt *v.* Rowell, 62 Mo. 524, § 224.
Field *v.* Chicago, etc. R. Co. 71 Ill. 458, §§ 554, 555.
Fifield *v.* Elmer, 25 Mich. 48, § 72.
Fillebrown *v.* Railroad, 55 Me. 462, § 553.
Final *v.* Backus, 18 Mich. 218, § 428.
Finch *v.* Newham, 2 Vern. 216, § 348.
v. Pinckard, 5 Ill. 69, § 1119.
v. Shaw, 19 Beav. 500, §§ 56, 674.
First National Bank *v.* Christopher, 40 N. J. L. 435, § 683*a*.
v. Priest, 50 Ill. 321, § 1265.
v. Ryerson, 23 Ia. 508, § 713.
v. Wood, 51 Vt. 571, § 829.
First National Bank of Milford *v.* Town of Milford, 36 Conn. 93, §§ 672, 675, 683.
Firth *v.* Thrush, 15 Eng. C. L. 242; 8 B. & C. 387, §§ 817, 990.
Fish *v.* Chapman, 2 Ga. 349, § 552.
v. Jackman, 19 Me. 467, § 881.
Fisher *v.* Fredericks, 33 Mo. 612, §§ 1352, 1364.
v. Knox, 13 Pa. St. 622, § 440.
v. Leland, 4 Cush. 456, § 92.
v. Price, 37 Ala. 407, § 936.
v. Sargent, 10 Cush. 250, § 480*n*.
v. Lunnard, 25 La. An. 179, §§ 147, 149.
Fisk *v.* Newton, 1 Den. 45, § 571.
v. Potter, 2 Keyes, 64, §§ 11, 31.
Fitch *v.* Rawling, 2 H. Black. 393, § 480*n*.
Fitchburg Bank *v.* Perley, 2 Allen, 433, § 798.
Fitts *v.* Whitney, 32 Vt. 589, §§ 1300, 1341, 1342.
Fitzhugh *v.* Barnard, 12 Mich. 105, § 307.
Flagg *v.* Mann, 2 Sumn. 486, §§ 26, 274, 279, 282, 284, 684.
Flavey *v.* Northern Transp. Co. 15 Wis. 129, § 548.

Fleming *v.* Beck, 48 Pa. St. 309, § 1244.
v. Burgin, 2 Ired. Eq. 584, §§ 244, 260.
Flickey *v.* Loney, 4 Baxt. 169, § 436.
Flight *v.* Barton, 3 Mylne & K. 282, §§ 30, 321.
Flint *v.* Sawyer, 30 Me. 226, § 1121.
Florence *v.* Paschal, 50 Ala. 28, § 1367.
Floyd *v.* Ricks, 14 Ark. 286, § 1415.
Flynt *v.* Arnold, 2 Metc. 619, §§ 96, 203.
Foard *v.* Womack, 2 Ala. 368, § 1003.
Fogarty *v.* Sawyer, 23 Cal. 570, § 96.
v. Sparks, 22 Cal. 142, §§ 343, 364.
Fogg *v.* Tenn. National Bank, 9 Heisk. 479, §§ 672, 683, 689.
Foland *v.* Boyd, 23 Pa. St. 476, § 1022.
Follain *v.* Lefevre, 3 Rob. (La.) 13, § 1413.
Folsom *v.* Merch. etc. Ins. Co. 38 Me. 414, § 480*n*.
Foot *v.* Stevens, 17 Wend. 483, § 1085.
Forbes *v.* Marsh, 15 Conn. 384, § 72.
Ford *v.* Dallom, 3 Cold. 67, § 957.
v. Stuart, 19 Johns. 342, § 431.
v. White, 16 Beav. 120, §§ 104, 231.
Forest *v.* Jackson, 56 N. H. 357, § 278.
Foster *v.* Barney, 3 Vt. 60, § 394.
v. Blackstone, 1 My. & K. 297, § 58.
v. Frampton, 6 B. & C. 107, §§ 462, 464.
v. McDonald, 5 Ala. 376, § 843.
v. Mix, 20 Conn. 395, § 436.
v. Newbrough, 58 N. Y. 481, §§ 1257, 1258.
v. Pointer, 9 Carr. & P. 718, § 1289.
v. Smith, 2 Cold. 474, § 1221.
v. Wade, 4 Metc. (Ky.) 252, § 1196.
v. White, 9 Port. 221, § 434.
Foster's Appeal, 3 Pa. St. 79, § 96.
Fourth National Bank *v.* Heuschen, 52 Mo. 207, §§ 751, 752.
Fowler *v.* Brantly, 14 Pet. 318, § 94.
v. Byrd, Hemst. 213, § 348.
Fox *v.* Commonwealth, 81 Pa. St. 511, § 1412.
v. Reeder, 28 Ohio St. 181, § 357.
Foye *v.* Leighton, 24 N. H. 29, § 1280.
Frail *v.* Ellis, 16 Beav. 350, § 19.
Fraley's Appeal, 76 Pa. St. 42, § 440.
France *v.* Lucy, Ry. & M. 341, § 1283.
Francis *v.* Norris, 2 Miles, 150, § 1115.
Frankford, etc. Co. *v.* Philadelphia, etc. R. Co. 54 Pa. St. 345, § 480*k*.
Franklin *v.* Brownlow, 14 Ves. 550, § 497.
v. Cannon, 1 Root (Conn.), 500, §§ 150, 155.
Franz *v.* Orton,
Fraschieris *v.* Henriques, 6 Abb. (N. S.), 251, § 477.
Frazier *v.* Steenrod, 7 Ia. 339, § 1088.
Freeborn *v.* Glazier, 10 Cal. 337, § 1192.
Freeman *v.* Thompson, 53 Mo. 183, § 1366.
Freeman's Bank *v.* Perkins, 18 Me. 292, § 714.
Freere *v.* Hesse, 4 De G. M. & G. 495, § 240.
Freidley *v.* Hamilton, 17 S. & R. 70, § 187.
French *v.* Bank of Columbia, 4 Cranch, 141, § 1004.
v. Lancaster, 2 Dak. 346, § 1410.
v. Loyal Co. 5 Leigh, 627, §§ 316, 368.
Frey *v.* Clifford, 44 Cal. 335, § 96.
Frick *v.* White, 57 N. Y. 103, § 431.
Frost *v.* Beekman, 1 Johns. Ch. 288, §§ 158, 307.
Fry *v.* Shehee, 55 Ga. 208, § 689.
Frye *v.* Partridge, 82 Ill. 267, § 307.
Fulcher *v.* Royal, 55 Ga. 68, § 268.
Fuller *v.* Bennett, 2 Hare, 394, §§ 29, 263, 672, 689, 690.
v. Hooper, 3 Gray, 334, §§ 733, 1021.
v. McDonald, 8 Me. 213, § 939.
v. Scrivner, 76 N. Y. 190, § 374.
v. Wilson, 3 Ad. & El. (N. S.) 629, § 654.
Fullerton *v.* Bank of United States, 1 Pet. 604, § 805.
Fulton *v.* McCracken, 18 Md. 528, §§ 697, 715.
Fulton Bank *v.* Benedict, 1 Hall, 480, §§ 676, 685.
v. N. Y. & S. Canal Co. 4 Paige, 127, §§ 674, 681, 683.
Furber *v.* Caverly, 42 N. H. 74, § 937.

G.

Gaff *v.* Sims, 45 Ind. 262, § 416.
Gage *v.* Lewis, 68 Ill. 604, § 418.
Gaines *v.* Union Tr. Co. 23 Ohio St. 418, §§ 555, 557.
Gale *v.* Walsh, 5 T. R. 239, § 1001.
Galesburg *v.* Higley, 61 Ill. 287, § 480*g*.
Galland *v.* Jackman, 26 Cal. 79, § 246.
Gallway *v.* Mathew, 1 Camp. 403; 10 East, 264, §§ 504, 524.
Galpin *v.* Abbott, 6 Mich. 17, §§ 119, 124, 137.
v. Page, 1 Sawyer, 309, § 1085.
Galway *v.* Malchow, 7 Neb. 289, § 96.
Games *v.* Stiles, 14 Pet. 322, § 348.
Gammon *v.* Hodges, 73 Ill. 140, § 152.
Gard *v.* Stevens, 12 Mich. 292, § 402.
Gardner *v.* Lacklin, 4 My. & C. 129, § 435.
Garnett *v.* Yoe, 17 Ala. 74, § 1221.
Garrard, *Ex parte*, L. R. 5 Ch. D. 61, § 433.
Garrett *v.* Puckett, 15 Ind. 485, § 313.
v. St. Louis, 25 Mo. 505, § 1123.
Garth *v.* Ward, 2 Atk. 174, §§ 338, 345.
Garver *v.* Downies, 33 Cal. 176, § 990.
Garvey *v.* Fowler, 4 Sandf. 665, § 1397.
Garvin *v.* Wells, 8 Ia. 286, § 1409.
Gary *v.* May, 16 Ohio, 66, § 1058.
Gates *v.* Beecher, 60 N. Y. 518, § 837.
v. Bushnell, 9 Conn. 530, § 348.
v. Johnson Co. 36 Tex. 141, § 1404.
Gatewood *v.* Hart, 58 Mo. 261, §§ 127, 133.
Gawtry *v.* Doane, 48 Barb. 148, § 957.
Gayoso Sav. Inst. *v.* Fellows, 6 Coldw. 467, § 436.
Geill *v.* Jeremy, 22 Eng. C. L. 249, §§ 805, 816.
Gemmell *v.* Rice, 13 Minn. 400, § 1047.
General Ins. Co. *v.* U. S. Ins. Co. 10 Md. 517, §§ 113, 244, 254, 683, 683*a*.
General Steam, etc. Co. *v.* Rolt, 6 C. B. N. S. 550, §§ 11, 29.
George *v.* Kent, 7 Allen, 16, §§ 208, 308.
v. Middough, 62 Mo. 549, § 1140.
v. Wood, 9 Allen, 80, §§ 203, 206.
Gernon *v.* Bestick, 15 La. An. 697, § 1097.
Gerrish *v.* Pike, 36 N. H. 510, § 1235.
Gerson *v.* Pool, 31 Ark. 85, § 49.
Gibbon *v.* Coggan, 2 Camp. 188, § 956.
v. Paynton, 4 Burr. 2298, § 542.
Gibbs *v.* Cannon, 9 S. & R. 198, § 417.
v. Cobb, 7 Rich. Eq. 54, §§ 30, 65.
Gibert *v.* Peteler, 38 N. Y. 165, § 307.
Gibler *v.* Trimble, 14 Ohio St. 323, §§ 364, 365.
Gibson *v.* Choteau, 39 Mo. 536, § 219.
v. Colt, 7 Johns. 390, §§ 660, 662.
v. Culver, 17 Wend. 305, §§ 574, 576.
v. Gibson, 20 Pa. St. 9, § 1225.
v. Ingo, 6 Har. 112, § 30.
v. Roll, 30 Ill. 172, §§ 1074, 1130.
Gilbert *v.* Dennis, 3 Met. 495, § 782.
v. Flint, etc. R. Co. 51 Mich. 488; 47 Am. Rep. 592, § 1417.
v. Jess, 31 Wis. 110, § 12.
Gilchrist *v.* Donnell, 53 Mo. 591, §§ 843, 846, 915.
Gill *v.* Cubitt, 3 B. & C. 466, § 82.
Gillespie *v.* Edmonston, 11 Humph. 553, §§ 384, 843.
v. Reed, 3 McLean, 377, § 128.
Gillet *v.* Fairchild, 4 Den. 80, § 428.
Gilman *v.* Hamilton, 16 Ill. 225, §§ 334, 359.
Gindrat *v.* Mechanics' Bank, 7 Ala. 324, §§ 702, 913.
Givens *v.* Merchants' National Bank, 85 Ill. 442, § 975.
Glascock *v.* Robards, 14 Mo. 350, § 593.
Glasgow *v.* Pratte, 8 Mo. 336, §§ 697, 706, 713.
Glasscock *v.* Bank of Missouri, 8 Mo. 443, § 706.
Glazebrook *v.* Ragland, 8 Gratt. 344, § 101.
Gleadell *v.* Thompson, 56 N. Y. 194, § 564.
Gleason *v.* Gleason, 8 Cush. 32, § 586.

Gleason *v.* Walsh, 43 Me. 397, § 480*n*.
Glencoe *v.* People, 78 Ill. 382, § 1363.
Glenn *v.* Davis, 35 Md. 215, § 96.
v. Glenn, 17 Ia. 498, § 1245.
Gliddon *v.* Hunt, 24 Pick. 221, §§ 203, 231*a*.
Glidewell *v.* Spaugh, 26 Ind. 319, §§ 65*a*, 273.
Globe, The, 2 Blatch. C. Ct. 427, § 1136.
Goddard *v.* Pratt, 16 Pick. 412, § 488..
v. Lyman, 14 Pick. 268, § 87.
v. Sawyer, 9 Allen, 78, § 272.
Godfrey *v.* Disbrow, Walk. Ch. 260, § 96.
v. Turnbull, 1 Esp. 371, § 513.
Goelet *v.* McManus, 1 Hun, 306, §§ 203, 231*a*.
Gold *v.* Death, Hobart, 92, § 693.
Goldsmith *v.* Sawyer, 46 Cal. 209, § 1408.
Good *v.* Martin, 95 U. S. 95, § 87.
Gooday *v.* Corlies, 1 Strob. (S. C.) 199, § 1235.
Goodloe *v.* Bartlett, 5 McLean, 186, § 1246.
Goodman *v.* Cloudman, 43 Me. 577, § 96.
v. Harvey, 4 Ad. & El. 870, §§ 80, 83, 94.
v. Norton, 17 Me. 381, § 805.
v. Simonds, 20 How. 343, §§ 36*a*, 80, 85, 372, 673*a*.
Goodnough *v.* Oshkosh, 24 Wis. 549; 1 Am. Rep. 202, § 480*g*.
Goodnow *v.* Warren, 122 Mass. 82, § 767.
Goodright *v.* Cordwent, 6 T. R. 219, § 648.
Goodsell *v.* Sullivan, 40 Conn. 83, § 202.
Goodtitle *v.* Woodward, 3 B. & Ald. 689, §§ 616, 698, 700.
Goodwin *v.* McGehee, 15 Ala. 232, § 348.
v. Railroad, 58 Barb. 195, § 568.
Gordon *v.* Gordon, 3 Sw. 400, § 65*a*.
v. Montgomery, 19 Ind. 110, §§ 933, 1404.
v. Sizer, 39 Miss. 805, §§ 15, 313.
Gore *v.* Brazier, 3 Mass. 523, § 480*c*.
Gorham *v.* Luckett, 6 B. Mon. 146, § 1187.
Gossler *v.* Schepeler, 5 Daily (N. Y.), 476, §§ 477, 479.
Gott *v.* Dinsmore, 111 Mass. 45, § 553.
Goudy *v.* Hall, 30 Ill. 109, § 1138.
Gouger *v.* Jolly, 1 Holt, 317, § 540.
Gould *v.* Cayuga Co. etc. Bank, 56 How. Pr. 505, § 683*b*.
v. Chase, 16 Johns. 226, § 431.
v. Day, 94 U. S. 405, § 143*a*.
v. Hill, 2 Hill, 623, § 552.
Gove *v.* Vining, 7 Metc. 212, § 940.
Goveneur *v.* Lynch, 2 Paige, 300, §§ 65*a*, 103, 278.
Governors of Grey Coat Hosp. *v.* Westminster, etc. Com'rs, 1 De G. & J. 531, § 240.
Gowan *v.* Jackson, 20 Johns. 175, §§ 733, 751, 1021.
Gower *v.* Doheney, 33 Ia. 36, § 97.
Grace *v.* Adams Ex. Co. 100 Mass. 505, §§ 553, 554.
Grafton, The Ship, Olcott's R. 48, § 563.
Gragg *v.* Richardson, 25 Ga. 566, § 480*c*.
Graham *v.* Anderson, 42 Ill. 514, §§ 1412, 1414.
v. King, 50 Mo. 22; 11 Am. Rep. 401, § 1066.
v. Meeks, 1 Or. 325, § 310.
v. Oldis, 1 Fost. & F. 262, § 1282.
v. Samuel, 1 Dana, 166, §§ 112, 125.
v. Williams, 21 La. An. 594, § 1405.
Grand Bank *v.* Blanchard, 23 Pick. 305, § 794.
Grand Tower Mining, etc. Co. *v.* Schermer, 64 Ill. 106, § 1376.
Grandin *v.* Anderson, 15 Ohio St. 286, § 208.
v. Leroy, 2 Paige, 509, § 94*a*.
Granger *v.* Brown, 11 Cush. 191, § 633.
v. Clark, 22 Me. 128, § 1085.
Granite Bank *v.* Ayers, 16 Pick. 392, § 916.
Grant *v.* Bissett, 1 Cai. Cas. 112, § 97.
v. Cole, 8 Ala. 519, § 674.
v. Ellicott, 7 Wend. 227, § 94*a*.
v. Lexington Fire Ins. Co. 5 Ind. 23, § 480*n*.
v. Munt, Coop. 173, § 65*a*.
v. Spencer, 1 Mont. 136, § 1026.
v. White, 42 Mo. 285, §§ 581, 594.
v. White, 6 Cal. 55, § 1321.
Grattan *v.* Wiggins, 23 Cal. 16, § 374.

Graul *v.* Strutzel, 53 Ia. 712, § 738.
Graves *v.* Graves, 6 Gray, 391, §§ 112, 119, 124.
v. Legg, 11 Exch. 642, § 480*o*.
v. Merry, 6 Cow. 701, § 513.
v. Ward, 2 Duv. 301, § 96.
Gray *v.* Bank of Kentucky, 29 Pa. St. 635, § 94*b*.
v. Bell, 3 Rich. 71, § 738.
v. Hawes, 8 Cal. 562, § 1137.
v. Larrimore, 2 Abb. (U. S.) 542, § 1031.
v. Nunan, 63 Cal. 220, § 1201.
Gray's Adm'rs *v.* Cruise, 36 Ala. 559, § 225.
Great Falls Co. *v.* Worster, 15 N. H. 412, § 297.
Great Western R. *v.* Wheeler, 20 Mich. 419, § 689.
Greaves *v.* Tofield, L. R. 14 Ch. D. 563, § 231.
Grellet *v.* Heilshorn, 4 Nev. 526, § 96.
Greely *v.* Hunt, 21 Me. 455, § 738.
Green *v.* Carrington, 16 Ohio St. 548, § 165.
v. Danby, 12 Vt. 338, § 480*g*.
v. Deakin, 2 Stark. 347, § 528.
v. Deal, 4 Hun, 703, § 197.
v. Drinker, 7 W. & S. 440, §§ 112, 231.
v. Early, 39 Md. 223, § 307.
v. Railroad, 41 Ia. 410, § 454.
v. Slayter, 4 Johns. Ch. 38, §§ 10, 341, 351.
v. Thompson, 33 Ia. 293, § 417.
v. Warnick, 64 N. Y. 220, § 197.
v. White, 7 Blackf. 242, § 347.
Green, etc. Navigation Co. *v.* Marshall, 48 Ind. 596, § 573.
Greene *v.* Farley, 20 Ala. 322, §§ 714, 912.
Greenfield *v.* Edwards, 2 De G. J. & S. 582, §§ 31, 65*a*, 307.
Greenleaf *v.* Edes, 2 Minn. 264, § 239.
Greenlow *v.* Williams, 2 Lea, 533, §§ 480*c*, 480*d*.
Greenman *v.* Harvey, 53 Ill. 368, § 1377.
Greenslade *v.* Dare, 20 Beav. 284, §§ 7, 11.
Gregory *v.* Haynes, 13 Cal. 591, § 374.
Grewell *v.* Henderson, 5 Cal. 465, § 1069.
Griffin *v.* Cunningham, 20 Gratt. 31, § 146.
v. Goff, 12 Johns. 423, § 975.
Griffin *v.* Pugh, 44 Mo. 326, § 72.
v. Wilcox, 21 Ind. 370, § 428.
v. Sheffield, 38 Miss. 359, § 1268.
Griffing *v.* Gibb, 2 Black. 519, § 1404.
Griffith *v.* Griffith, 1 Hoff. Ch. 153, §§ 15, 47, 313, 351.
Grignon's Lessees *v.* Astor, 2 How. 319, § 1085.
Grim *v.* Curley, 43 Cal. 250, § 280.
Grimes *v.* Fall, 15 Cal. 63, § 1257.
Grimstone *v.* Carter, 3 Paige, 421, §§ 103, 119, 149, 188, 279, 299.
Grinman *v.* Walker, 9 Ia. 426, §§ 786, 830.
Grinnan *v.* Baton Rouge Co. 7 La. An. 638, § 516.
Griswold *v.* Smith, 10 Vt. 452, §§ 44, 113.
v. Waddington, 16 La. An. 484; 15 Johns. 57, §§ 752, 981.
Grob *v.* Cushman, 45 Ill. 119, § 1404.
Grocers' Bank *v.* Penfield, 7 Hun, 279, § 94*b*.
Groff *v.* Ramsey, 19 Minn. 44, § 278.
Grosvenor *v.* Atlantic Fire Ins. Co. 17 N. Y. 319, § 445.
v. Green, 28 L. J. Ch. 173, § 35.
v. Stone, 8 Pick. 79, §§ 730, 731.
Groton *v.* Dallheim, 6 Me. 476, § 1018.
Grout *v.* Hill, 4 Gray, 361, § 466.
Guilford *v.* Smith, 30 Vt. 49, § 464.
Guion *v.* Knapp, 6 Paige, 35, §§ 203, 308, 331.
Gunn *v.* Sinclair, 52 Mo. 327, § 611.
Gunson *v.* Metz, 1 B. & C. 193, § 962.
Gwinn *v.* Turner, 18 Ia. 1, § 167.

H

Haas *v.* Weinhagen, 30 Wis. 326, § 1210.
Hackett *v.* Martin, 8 Me. 77, §§ 431, 438, 442.
Hackwith *v.* Damron, 1 Monr. 235, §§ 15, 277, 305, 308, 310.
Hadden *v.* Spader, 20 Johns. 554, §§ 342*a*, 353.
Haescig *v.* Brown, 34 Mich. 503, § 93.
Hagthrop *v.* Hook, 1 Gill & J. 270, § 310.
Hahn *v.* Kelly, 34 Cal. 391, § 1085.
Hailes *v.* State, 9 Tex. App. 170, § 1408.
Halbert *v.* Skyles, 1 A. K. Marsh. 368, §§ 1408, 1409.

Haley *v.* Williams, 8 Sm. & M. 487, § 1184.
Hall *v.* Brown, 58 N. H. 93, § 1404.
v. Cheney, 36 N. H. 26, § 558.
v. Hale, 8 Conn. 336, §§ 90, 94.
v. Hickman, 2 Del. Ch. 318, § 431.
v. McDuff, 24 Me. 311, § 208.
v. Pillow, 31 Ark. 32, §§ 77, 224.
v. Robinson, 2 Comst. (N. Y.) 293, § 428.
v. Smith, 14 Ves. 426, § 279.
v. Wadsworth, 28 Vt. 410, § 578.
Halleck *v.* Moss, 17 Cal. 339, § 1129.
Halley *v.* Oldham, 5 B. Mon. 233, §§ 232, 266.
Hallowell *v.* Curry, 41 Pa. St. 322, § 819.
Hall's Heirs *v.* Hall, 2 Root, 383, § 113.
Halsey *v.* Carter, 6 Rob. (N. Y.) 535, § 1199.
Halstead *v.* Bank of Kentucky, 4 J. J. Marsh. 554, §§ 113, 203.
Ham *v.* Ham, 39 Me. 363, § 1410.
Hamilton *v.* Boggess, 63 Mo. 233, § 211.
v. Fowlkes, 16 Ark. 340, § 96.
v. Lycoming Mut. Ins. Co. 5 Pa. St. 339, § 383.
v. Marks, 52 Mo. 78; 63 Mo. 167, §§ 80, 87, 88.
v. Nutt, 34 Conn. 501, § 310.
v. Royse, 2 Sch. & Lef. 315, §§ 7, 313, 314.
Hammond *v.* Gilmore, 14 Conn. 479, §§ 418, 419.
v. Hopping, 13 Wend. 505, § 1266.
Hanauer *v.* Doane, 12 Wall. 342, § 92*a*.
Hanbury *v.* Litchfield, 2 My. & K. 629, §§ 281, 282, 284.
Hancock *v.* Beverly, 6 B. Mon. 531, § 219.
Hankinson *v.* Barbour, 29 Ill. 80, §§ 11, 246.
Hanly *v.* Morse, 32 Me. 287, §§ 44, 65*a*, 277.
Hanrick *v.* Thompson, 9 Ala. 409, § 292.
Hansen *v.* Fish, 27 Wis. 535, § 1188.
Harang *v.* Plattsmier, 21 La. An. 426, § 97.
Harbeck *v.* Toledo, 11 Ohio St. 219, § 1127.
Hardaway *v.* Semmes, 24 Ga. 305, § 225.
Harden *v.* Boyce, 59 Barb. 425, § 980.
Hardin *v.* Harrington, 11 Bush, 367, §§ 60, 61.
v. Kretsinger, 17 Johns. 293, § 1266.
Harding *v.* Stafford, Say. Rep. 133, § 1199.
Hardy *v.* Reeves, 5 Ves. 426, § 65*a*.
v. Summers, 10 Gill & J. 316, §§ 44, 273.
Hargen *v.* Bemis, 1 Thomp. & C. 460, § 921.
Hargreaves *v.* Rothwell, 1 Keen. 154, § 689.
Harker *v.* Anderson, 21 Wend. 372, § 1387.
Harlan *v.* Seaton, 18 B. Mon. 312. §§ 219, 221.
Harmon *v.* State, 18 Ind. 450, § 1416.
Harnden *v.* New Haven, etc. Co. 27 Conn. 158, § 480*g*.
Harper *v.* Reno, 1 Freem. Ch. 323, § 125.
Harral *v.* Gray, 10 Neb. 189, § 96.
Harrington *v.* Allen, 48 Miss. 493, § 97.
v. Fortner, 58 Mo. 468, § 140.
v. Loomis, 10 Minn. 366, § 1043.
v. Slade, 22 Barb. 161, § 341.
Harris *v.* Arnold, 1 R. I. 125, §§ 206, 273, 274.
v. Barwell, 65 N. C. 534, § 431.
v. Bell, 10 S. & R. 39, § 231.
v. Brown, 63 Me. 51, § 1234.
v. Carter, 3 Stew. 233, §§ 44, 341.
v. Ferrand, Hardres, 36, § 1387.
v. Fly, 7 Paige, 421, § 324.
v. Frink, 2 Lans. (N. Y.) 35, § 593.
v. Grodner, 42 Mo. 159, § 1057.
v. Memphis Bank, 4 Humph. 519, § 922.
v. Pratt, 17 N. Y. 249, §§ 464, 466.
v. Robinson, 4 How. 336, §§ 821, 921.
v. Tumbridge, 8 Abb. N. C. 291, § 480*o*.
v. Whitcomb, 4 Gray, 433, § 1257.
Harrisburg Bank *v.* Meyer, 6 S. & R. 537, § 92*a*.
Harrison *v.* Bailey, 99 Mass. 620, § 1397.
v. Cachelin, 23 Mo. 117, §§ 191, 208.

Harrison *v.* Farmers' Bank of Virginia, 6 W. Va. 1, § 146.
v. London, Brighton & S. Coast R. Co. 2 B. & S. 122, § 542.
v. Ruscoe, 15 M. & W. 231, § 719.
v. Trader, 29 Ark. 85, § 1000.
Harrold *v.* Simons, 9 Mo. 326, § 163.
Harrop *v.* Landers, etc. Co. 45 Conn. 561, § 436.
Harryman *v.* Collins, 18 Beav. 19, §§ 13, 34.
Hart *v.* Albany, 3 Paige, 213, § 480*h*.
v. Alexander, 2 M. & W. 484, § 485.
v. Carpenter, 24 Conn. 427, § 72.
v. Chalker, 14 Conn. 77, §§ 149, 178.
v. Eastman, 7 Minn. 74, § 738.
v. Farmers' & Mechanics' Bank, 33 Vt. 252, §§ 191, 673*a*, 674, 685, 687, 689.
v. Gray, 3 Sumn. 339, §§ 1341, 1342.
v. Robinet, 5 Mo. 11, § 1267.
Hartford Bank *v.* Hart, 3 Day, 491, § 683.
v. Steadman, 3 Conn. 489, §§ 795, 818.
Hartley *v.* Case, 1 Carr. & P. 555, §§ 780, 784.
Hartmyer *v.* Gates, 1 Root, 61, § 155.
Harvey *v.* Fisk, 9 Cal. 93, § 1086.
v. Mitchell, 2 Mood. & R. 366, § 1274.
Harwood *v.* Jarvis, 5 Sneed, 375, § 1016.
v. Smethurst, 30 N. J. L. 230, § 1172.
Haskell *v.* Bartlett, 34 Cal. 281, § 1125.
v. Boardman, 8 Allen, 38, §§ 946, 950.
v. Jones, 86 Pa. St. 173, § 94*a*.
v. State, 31 Ark. 91, § 49.
Hassett *v.* Rust, 64 Mo. 325, §§ 1155, 1297.
Hastings *v.* Cutler, 24 N. H. 481, §§ 4, 7, 12, 673*a*.
v. Pepper, 11 Pick. 41, § 480*a*.
Hatch *v.* Bigelow, 39 Ill. 546, §§ 280, 293.
v. Dennis, 10 Me. 244, § 431.
v. Searles, 24 L. J. Ch. 22, § 80.
v. Taylor, 10 N. H. 547, § 660.
Haughwout *v.* Murphy, 21 N. J. Eq. 118, § 348.
Havens *v.* Adams, 8 Allen, 363, § 339.
v. Bliss, 26 N. J. Eq. 363, § 273.
v. Dale, 18 Cal. 359, § 288.
v. Sherman, 42 Barb. 636, §§ 1075, 1130.
Hawkes *v.* Phillips, 7 Gray, 284, § 87.
Hawks *v.* Salter, 4 Bing. 715, §§ 805, 813, 822.
Hawley *v.* Cramer, 4 Cow. 717, §§ 30, 61.
Hawthorn *v.* Hoboken, 32 N. J. L. 172, § 1404.
Hayden *v.* Boyce, 59 Barb. 425, § 983.
v. Bucklin, 9 Paige, 512, §§ 350, 357.
v. Dunlap, 3 Bibb, 216, § 1087.
Haynes *v.* Birks, 3 Bos. & P. 599, §§ 781, 817.
v. Brown, 36 N. H. 568, § 676.
v. Calderwood, 23 Cal. 409, § 374.
v. Meeks, 10 Cal. 110, § 1129.
v. Seachrest, 13 Ia. 455, § 97.
Hays *v.* Davis, 18 N. H. 600, § 143*a*.
v. Lewis, 21 Wis. 663, § 1062.
v. McGuire, 8 Yerg. 92, § 96.
v. Morrille, 14 Pa. St. 48, § 461.
v. Riddle, 1 Sandf. 246, § 1263.
Hayton *v.* Hope, 3 Mo. 53, § 1211.
Haywood *v.* Nat. Ins. Co. 52 Mo. 181, §§ 674, 688.
v. Russell, 44 Mo. 252, §§ 1058, 1073.
Hazard *v.* White, 26 Ark. 155, § 956.
Hazleton Coal Co. *v.* Ryerson, 20 N. J. L. 129, § 883.
Hazlett *v.* Poultney, 1 Nott & M. 466, § 714.
Head *v.* Fordyce, 17 Cal. 149, § 374.
Heaston *v.* Cinn. etc. R. Co. 16 Ind. 275, § 1404.
Heath, *Ex parte*, 2 Ves. & B. 240, §§ 997, 999.
Heatly *v.* Finster, 2 Johns. Ch. 158, § 341.
Heaton *v.* Findlay, 12 Pa. St. 304, § 1227.
v. Hulbert, 4 Ill. 489, §§ 420, 422.
Hedges *v.* Railroad, 49 N. Y. 223, § 577.
Heermans *v.* Ellsworth, 64 N. Y. 159, § 8.
Heistner *v.* Fortner, 2 Binn. 40, §§ 112, 125.

Helgear *v.* Hawke, 5 Esp. 72, §§ 653, 662.
Helms *v.* Chadbourne, 45 Wis. 60, §§ 10, 65*a*.
Hempstead *v.* Darby, 2 Mo. 25, § 1211.
Henderhen *v.* Cook, 66 Barb. 21, §§ 668, 691.
Hendley *v.* Baccus, 32 Tex. 328, § 1372.
Hendrick *v.* Davis, 27 Ga. 167, § 1086.
Hendrickson's Appeal, 24 Pa. St. 363, § 188.
Henly *v.* Gore, 4 Dana, 133, § 376.
Hennen *v.* New Orleans & C. R. Co. 20 La. Ann. 544, § 1203.
Hennessey *v.* Stewart, 31 Vt. 486, § 1257.
Henning *v.* Fisher. 6 W. Va. 238, § 146.
Henning's Case, 2 Croke, 432. § 1387.
Henry *v.* Morgan, 2 Binn. 497, §§ 693, 694.
v. Raiman, 25 Pa. St. 354, §§ 60, 265.
Hensley *v.* Tarpey, 7 Cal. 288, § 1417.
Henthorn *v.* Doe, 1 Blackf. 157, § 1405.
Herbage *v.* McEntee, 40 Mich. 337, § 87.
Herdman *v.* Short, 18 Ill. 59, § 1074.
Hermon *v.* Denning, 44 Conn. 124, § 176.
Herndon *v.* Kimball, 7 Ga. 432, § 112.
Herrick *v.* Atwood, 2 De G. & J. 21, § 13.
Herrin *v.* Libbey, 36 Me. 350, §§ 1243, 1321.
Herrington *v.* Herrington, 27 Mo. 560, § 357.
v. McCullum, 73 Ill. 476, § 357.
Herschfeld *v.* Dexel, 12 Ga. 582, § 1405.
Hersey *v.* Turbett, 27 Pa. St. 418, §§ 339, 342*a*.
Hervey *v.* Smith, 22 Beav. 299, §§ 16, 25, 65*a*, 303.
Hesters *v.* Petrovic, 1 Rob. (La.) 119, §§ 745, 747.
Hetherington *v.* Clark, 30 Pa. St. 393, §§ 205, 223.
Hetzel *v.* Barber, 69 N. Y. 1, § 214.
Hevener *v.* Heist, 9 Phila. 274, § 1358.
Hewes *v.* Wiswall, 8 Greenl. 94, §§ 274, 288, 291, 294.
Hewitt *v.* Loosemore, 9 Hare, 449, §§ 47, 690.
v. Wetherby, 57 Mo. 276, § 1347.
Hibernian Bank *v.* Everman, 52 Miss. 500, § 372.
Hickerson *v.* Raignell, 2 Heisk. 329, § 94*a*.
Hickman *v.* Dale, 7 Yerg. 149, § 343.
Hicks *v.* Hankin, 4 Esp. 114, § 656.
v. Skinner, 71 N. C. 539, § 224.
Hickson *v.* Callis, 1 Jones & L. 94, § 241.
Hidden *v.* Bishop, 5 R. I. 29, § 94*a*.
Hiern *v.* Mill, 13 Ves. 114, §§ 47, 50, 56.
Higgins *v.* Shaw, 2 Dr. & War. 356, § 344.
Hightower *v.* Ivy, 2 Port. 308, § 939.
Hildreth *v.* Lowell, 11 Gray, 345, § 1342.
Hill *v.* Bacon, 43 Ill. 477, § 1416.
v. Beatty, 61 Cal. 292, § 1202.
v. Calvin, 4 How. (Miss.) 231, § 390.
v. Faison, 27 Tex. 428, § 1069.
v. Grant, 33 Tex. 132, § 1368.
v. Humphreys, 5 W. & S. 123, § 574.
v. Kroft, 29 Pa. St. 186, § 372.
v. Manchester, etc. Co. 5 B. & Ad. 874; 2 Nev. & M. 573, § 676.
v. Martin, 12 Mart. 177, § 945.
v. Mason, 38 Me. 461, § 1121.
v. McCarter, 27 N. J. Eq. 41, § 203.
v. Meeker, 24 Conn. 211, § 219.
v. Norris, 2 Stew. & P. 114, § 1013.
v. Norvell, 3 McLean, 583, § 907.
v. Oliphant, 41 Pa. St. 364, § 343.
v. Planters' Bank, 3 Humph. 670, § 717.
v. Simpson, 7 Ves. 152, §§ 11, 333.
v. Varrell, 3 Me. 233, § 909.
Himes *v.* Keighblingher, 14 Ill. 469, § 143*a*.
Himmelman *v.* Hoadley, 44 Cal. 213, § 1412.
Hinckley *v.* Beckwith, 23 Wis. 328, § 1411.
Hinde *v.* Vattier, 1 McLean, 110; 7 Pet. 252, §§ 8, 30, 65.
Hinds *v.* Allen, 34 Conn. 195, § 480*c*.
Hine *v.* Allely, 4 B. & Ad. 624, § 781.

Hine *v.* Dodd, 2 Atk. 275, §§ 11, 245.
v. Robbins, 8 Conn. 342, § 113.
Hinman *v.* Hinman, 4 Conn. 575, § 113.
Hiorns *v.* Holton, 16 Beav. 259, § 690.
Hipes *v.* Cochran, 13 Ind. 175, § 1236.
Hirsch *v.* Quaker City, 2 Disney, 144, § 570.
Hiscock *v.* Phelps, 2 Lans. 106, § 1218.
Hix *v.* Cornelison, 7 Cold. (Tenn.) 299, § 1194.
Hizer *v.* State, 12 Ind. 330, § 1412.
Hoadley *v.* N. T. Co. 115 Mass. 304, § 553.
Hobart *v.* Hilliard, 11 Pick. 143, § 1390.
Hobbs *v.* Clements, 32 Me. 67, § 1117.
v. Memphis Ins. Co. 1 Sneed, 444, § 444.
v. Spiegleberg, 5 W. Coast Rep. 327, § 113.
Hobson *v.* Stevenson, 1 Tenn. Ch. 203, § 436.
Hodges *v.* Brett, 4 G. Green, 345, § 1365.
Hodgkins *v.* Montgomery Co. Ins. Co. 34 Barb. 213, § 689.
Hodgson *v.* Butts, 3 Cranch, 140, § 125.
v. Dean, 2 Sim. & Stu. 227, §§ 104, 106.
Hoffman *v.* State, 12 Tex. App. 406, § 1410.
v. Strobecker, 7 Watts, 90, § 226.
Hoffmann *v.* Smith, 1 Cal. 160, § 1003.
Hogan *v.* Black, 4 Pac. Rep. 943, § 431.
Hogden *v.* Guttery, 58 Ill. 431, § 97.
Holbrook *v.* Dickenson, 56 Ill. 497, § 97.
v. Vose, 6 Bosw. 76; 4 L. Reg. (N. S.) 602, §§ 464, 472.
Holbrow *v.* Wilkins, 1 B. & C. 10, §§ 401, 423.
Holdane *v.* Butterworth, 5 Bosw. 1, § 515.
Holden *v.* N. Y. & Erie Bank, 6 Rep. 692; 72 N. Y. 286, §§ 672, 674, 683, 687, 689.
Holland *v.* Turner, 10 Conn. 308, §§ 946, 951.
Holliday *v.* Franklin Bank, 16 Ohio, 533, § 231*a*.
Hollister *v.* Nowlen, 19 Wend. 234, § 552.
Holman *v.* Eiterman, 83 Ill. 92, § 1161.
v. Patterson's Heirs, 29 Ark. 357, § 339.
v. Whitney, 19 Ala. 703, § 943.
Holme *v.* Kansper, 5 Binn. 469, § 94*b*.
Holmes *v.* Furguson, 1 Oreg. 220, § 310.
v. Powell, 8 De G. M. & G. 572, §§ 44, 65*a*, 279, 288.
v. Stout, 10 N. J. Eq. 492, §§ 288, 290.
v. Weed, 24 Barb. 546, § 480*m*.
Holst *v.* Pownal, 1 Esp. 240, § 462.
Holt *v.* Miers, 9 Carr. & P. 199, § 1287.
v. Penobscot, 56 Me. 15, § 480*g*.
Home Ins. Co. *v.* Green, 19 N. Y. 518, § 837.
Home Life Ins. Co. *v.* Pierce, 75 Ill. 426, § 668.
Homer *v.* Grosholz, 38 Md. 521, § 96.
Honore's Ex'r *v.* Bakewell, 6 B. Mon. 67, § 330.
Hood *v.* Fahnestock, 1 Pa. St. 470 (8 Watts, 489), §§ 283, 674, 688, 692.
Hooker *v.* Hammel, 7 Neb. 234, § 96.
Hoopes *v.* Knell, 31 Md. 550, § 101.
Hoover *v.* Tibbitts, 13 Wis. 79, § 466.
v. Wise, 91 U. S. 308, § 686.
Hope *v.* Liddell, 21 Beav. 183, §§ 15, 313, 324.
Hopes *v.* Alder, 6 East, 16, § 705.
Hopgood *v.* Earnest, 3 De G. J. & S. 116, §§ 47, 65*a*.
Hopkins *v.* Gerrard, 7 B. Mon. 312, §§ 246, 299.
v. Kansas City, etc. R. Co. 79 Mo. 98, § 1411.
v. Liswell, 12 Mass. 52, § 956.
v. McLaren, 4 Cow. 667, § 348.
Hopkirk *v.* Page, 2 Brock. 20, §§ 981, 1004, 1006.
Hopley *v.* Dufresne, 15 East, 275, § 975.
Hoppin *v.* Doty, 25 Wis. 573, § 23.
Hoppock *v.* Johnson, 14 Wis. 303, § 674.
Horace *v.* Chicago, etc. R. Co. 38 Wis. 463, § 1409.
Horn *v.* Jones, 28 Cal. 194, §§ 369, 374.
Horne *v.* Howell, 46 Ga. 9, § 280.

Horton *v.* Bayne, 52 Mo. 531, §§ 80, 87.
Hotchkiss *v.* Hunt, 49 Me. 213, § 72.
Hough *v.* Gray, 19 Wend. 202, §§ 420, 422.
Houghtaling *v.* Ball, 19 Mo. 84, § 1405.
Houghton *v.* Bartholomew, 10 Metc. 138, § 96.
v. Ely, 26 Wis. 181, § 87.
Housatonic Bank *v.* Martin, 1 Metc. 308, § 683.
House *v.* Adams, 48 Pa. St. 261, § 983.
Housego *v.* Cowne, 2 M. & W. 348, §§ 831, 832.
Houseman *v.* Mut. Build. etc. Ass'n, 81 Pa. St. 256, § 688.
Houston, etc. R. Co. *v.* Hodde, 42 Tex. 467, §§ 571, 573.
Hovey *v.* Blanchard, 13 N. H. 145, §§ 672, 689, 691.
Howard *v.* Chase, 104 Mass. 249, § 313.
v. Great W. Ins. Co. 109 Mass. 384, § 480*n*.
v. Ives, 1 Hill, 263, §§ 715, 795, 818.
v. Kennedy, 4 Ala. 592, § 343.
Howard Ins. Co. *v.* Halsey, 4 Sandf. 565; 8 N. Y. 271, §§ 17, 43, 203, 307, 688.
Howe *v.* Bradley, 19 Me. 31, § 836.
v. Hall, 14 East, 274, § 1263.
v. Nickels, 22 Me. 175, § 390.
v. Stewart, 40 Vt. 145, § 457.
v. Thayer, 17 Pick. 91, § 486.
Howell *v.* Howell, 5 W. Coast Rep. 286, § 1240.
v. Huyck, 2 Abb. App. Dec. 423, §§ 1262, 1268.
Howry *v.* Eppinger, 34 Mich. 29, §§ 90, 92.
Hoxie *v.* Carr, 1 Sumn. 173, §§ 26, 371.
Hoy *v.* Bramhall, 19 N. J. Eq. 563, §§ 10, 16.
Hoyt *v.* Jeffers, 30 Mich. 181, §§ 480*k*, 695.
v. McNeil, 13 Minn. 390, § 1405.
v. Sheldon, 3 Bosw. 267, § 8.
v. Thompson, 5 N. Y. 347, § 96.
Hubbard *v.* Matthews, 54 N. Y. 43, §§ 748, 751, 753.
Huddeson *v.* Prizer, 9 Phila. 65, § 1358.
Hudgens *v.* Jackson, 51 Ala. 514, § 1096.
Hudson *v.* Warner, 2 H. & G. 415, §§ 34, 36.
Huff *v.* Hutchinson, 14 How. 586, § 1085.
Huffman *v.* San Joaquin Co. 21 Cal. 426, § 480*g*.
Hughes *v.* Bowen, 15 Ia. 446, § 956.
v. Cannon, 2 Humph. 589, § 127.
v. Dudnam, 8 Jones, 127, §§ 149, 162.
v. Osborn, 42 Ind. 450, §§ 1155, 1346.
v. United States, 4 Wall. 232, §§ 44, 273.
v. Watt, 26 Ark. 328, § 1094.
Hulbert *v.* Pacific Ins. Co. 2 Sumn. 471, § 670.
Hulett *v.* Soulard, 26 Vt. 295, § 480*m*.
Hulings *v.* Guthrie, 4 Pa. St. 123, § 238.
Hull *v.* Noble, 40 Me. 459, §§ 10, 277, 279.
Hultain *v.* Munigle, 6 Allen, 220, § 609.
Hume *v.* Watt, 5 Kan. 34, §§ 756, 878.
Humphrey *v.* Burnside, 4 Bush, 215, § 1411.
Humphreys *v.* Newman, 51 Me. 40, § 208.
Humphries *v.* Budd, 5 Jur. 630, § 1410.
v. McCraw, 9 Ark. 91, § 1230.
Hundley *v.* Mount, 8 Sm. & M. 387, § 192.
Hunt *v.* Bailey, 39 Mo. 257, § 606.
v. Crane, 33 Miss. 669, § 1243.
v. Elmes, 2 De G. F. & J. 578, § 65*a*.
v. Johnson, 19 N. Y. 279, §§ 97, 113.
v. Lowell, 1 Allen, 343, § 1255.
v. Maybee, 7 N. Y. 266, § 990.
Hunter *v.* Boucher, 3 Pick. 289, § 671.
v. Hook, 64 Barb. 468, § 957.
v. Hudson, etc. Co. 20 Barb. 493, § 654.
v. Kennedy, 1 Ir. Ch. R. 148, § 104.
v. Watson, 12 Cal. 363, §§ 97, 203.
Huntington *v.* Charlotte, 15 Vt. 46, § 1085.
v. Harvey, 4 Conn. 124, §§ 956, 966.
Hurlbutt *v.* Buttenop, 27 Cal. 50, § 374.

Hussey *v.* Freeman, 10 Mass. 84, § 965.
Huston *v.* Peters, 1 Metc. (Ky.) 558, § 575.
Hutcheson *v.* Blakeman, 3 Metc. (Ky.) 80, § 385.
Hutcheson *v.* Johnson, 1 Binn. 59, § 1321.
Hutchings *v.* Nunes, 1 Moore P. C. N. S. 243, § 480.
Hutchins *v.* Bank of Tenn. 4 Humph. 418, § 504.
v. Hudson, 8 Humph. 426, § 504.
Hutchinson *v.* Harttman, 15 Kan. 133, §§ 204, 316.
Hutz *v.* Karthouse, 4 Wash. C. C. 1. § 736.
Hyatt *v.* Bank of Ky. 8 Bush, 193, § 822.
Hyde *v.* Navigation Co. 5 T. R. 389, § 574.
Hyslop *v.* Hoppock, 5 Ben. 447; 6 Bank. Reg. 552, §§ 1349, 1356.
v. Jones, 3 McLean, 96, § 829.

I.

Ibbottson *v.* Rhodes, 2 Vern. 554, §§ 7, 35.
Iglehart *v.* Crane, 42 Ill. 261, § 203.
Ill. Cent. R. Co. *v.* Ashmead, 58 Ill. 487, § 455.
v. Frankenberg, 54 Ill. 88, § 553.
v. Hornberger, 77 Ill. 457, § 455.
v. Johnson, 40 Ill. 35, § 1417.
v. McClellan, 54 Ill. 58; 42 Ill. 355, §§ 455, 480*k*.
v. McCullough, 59 Ill. 166, §§ 64, 273, 277, 299.
v. Morrison, 19 Ill. 136, § 553.
Ince *v.* Everard, 6 T. R. 545, § 161.
Indianapolis, etc. R. Co. *v.* Caldwell, 9 Ind. 397, § 1409.
v. Case, 15 Ind. 2, § 1410.
v. Moore, 16 Ind. 43, § 1410.
v. Paramore, 12 Ind. 426, § 1410.
v. Stephens, 28 Ind. 429, § 1410.
Inglehart *v.* Thousand Island Hotel Co. 14 N. Y. Sup. Ct. 547, § 671.
Inglis *v.* State, 61 Ind. 212, § 1412.
Ingraham *v.* Disborough, 47 N. Y. 421, § 431.
v. State, 27 Ala. 17, § 1412.
Ingrem *v.* Phillips, 3 Strobh. 565, § 231.
Inloe's Lessees *v.* Harvey, 11 Md. 519, § 339.
Irby *v.* Vining, 2 McCord, 379, § 485.
Ireland *v.* Kipp, 10 Johns. 489; 11 Johns. 231, §§ 786, 847.
Irvin *v.* Smith, 17 Ohio, 226, §§ 225, 364.
Irwin *v.* Phillips, 5 Cal. 140, § 1411.
Isaacs *v.* Shattuck, 12 Vt. 668, § 1090.
Isbell *v.* Kenyon, 33 Mich. 63, § 1092.
Isham *v.* Bennington Iron Co. 19 Vt. 230, §§ 112, 125.
Isett *v.* Hoge, 2 Watts, 128, § 421.
Isley *v.* Jones, 12 Gray, 260, §§ 413, 414, 415.
v. Stubbs, 9 Mass. 65, § 466.
Ives *v.* Bosley, 35 Md. 262, § 87.
Izett *v.* Mountain, 4 East, 371, § 542.

J.

Jaccard *v.* Anderson, 37 Mo. 91, § 934.
Jacks *v.* Darrin, 3 E. D. Smith, 557, § 1009.
Jackson *v.* Andrews, 7 Wend. 152, § 341.
v. Bryan, 1 Johns. 322, § 588.
v. Bull, 1 Johns. Cas. 81, § 216.
v. Burgott, 10 Johns. 457, § 7.
v. Caldwell, 1 Cow. 622, §§ 30, 65.
v. Dubois, 4 Johns. 216, § 230.
v. First Nat. Bank, 42 N. J. L. 178, § 94*b*.
v. French, 3 Wend. 337, § 593.
v. Given, 8 Johns. 137, § 97.
v. Green, 4 Johns. 186, § 588.
v. Hopkins, 18 Johns. 487, §§ 589, 599.
v. Langhead, 2 Johns. 75, § 588.
v. Leek, 19 Wend. 339, § 672.
v. Losee, 4 Sandf. Ch. 381, § 341.
v. Luce, 14 Ohio, 514, § 231*a*.
v. Moncrief, 5 Wend. 26, § 593.
v. Nichol, 5 Bing. N. C. 508, § 464.
v. Niven, 10 Johns. 335, § 588.
v. Parkhurst, 5 Johns. 128, § 595.
v. Post, 15 Wend. 588, § 229.
v. Richards, 2 Cai. 343, § 779.
v. Rowan, 9 Johns. 330, § 593.

Jackson *v.* Rowe, 2 Sim. & St. 472, §§ 11, 30, 65*a*.
v. Sample, 1 Johns. Cas. 231, § 595.
v. Sharp, 9 Johns. 162, § 672.
v. Stackhouse, 1 Cow. 122, § 599.
v. State, 19 Ind. 313, § 1416.
v. Stone, 13 Johns. 447, § 343.
v. Tuttle, 9 Cow. 233, § 343.
v. Van Valkenburg, 8 Cow. 260, §§ 34, 97, 188, 245, 252.
v. Warren, 32 Ill. 331, §§ 344, 357.
v. Wilsey, 9 Johns. 267, § 587.
v. Winslow, 9 Cow. 13, § 672.
v. Woolsey, 11 Johns. 446, § 1271.
Jackson *ex dem.* Davis *v.* Bronson, 4 Cow. 51, § 1178.
Jacob *v.* Lee, 2 Mood. & R. 33, § 1282.
Jacobs *v.* Turner, 2 La. An. 964, § 858.
Jacobus *v.* Railroad, 20 Minn. 125, § 558.
Jaffrey *v.* Brown, 17 Hun, 575, § 351.
James *v.* Brown, 11 Mich. 25, § 203.
v. Griffin, 2 M. & W. 623, § 465.
v. Morey, 2 Cow. 246, §§ 119, 186, 272.
v. Wade, 21 La. An. 548, § 984.
Jameson *v.* Swinton, 2 Camp. 373; 2 Taunt. 224, §§ 697, 703, 790.
Janes *v.* Scott, 59 Pa. St. 178, § 417.
Janesville *v.* Milwaukee, etc. R. Co. 7 Wis. 484, § 1404.
Janney *v.* Spedden, 38 Mo. 395, § 1050.
Jaques *v.* Weeks, 7 Watts, 261, §§ 28, 30, 103, 187, 191, 278, 279, 284, 299.
Jarves *v.* Aikens, 25 Vt. 635, §§ 201, 214.
Jarvis *v.* Barrett, 14 Wis. 591, § 1031.
v. Robinson, 21 Wis. 523, § 1405.
Jasper *v.* Porter, 2 McLean, 579, § 1404.
Jay *v.* Richardson, 30 Beav. 563, § 7.
Jeffersonville, etc. R. Co. *v.* Cleveland, 2 Bush, 468, § 570.
Jefford *v.* Ringold, 6 Ala. 544, §§ 1286, 1290.
Jeffreys *v.* Evans, 6 B. Mon. 119, § 431.
Jencks *v.* Phelps, 4 Conn. 149, § 348.
Jenkins *v.* Blizard, 1 Stark. 418, § 503.
v. Bodley, 1 Sm. & M. Ch. 338, § 44.
v. Eldridge, 3 Story, 181, § 11.
v. State, 33 Miss. 382, § 1187.
v. Usborne, 7 My. & G. 678, § 478.
Jenks *v.* Payne, 15 Johns. 399, § 1176.
Jennings *v.* Moore, 2 Vern. 609, § 691.
v. Roberts, 2 Eng. L. & Eq. 118, § 723.
v. Wood, 20 Ohio, 261, §§ 147, 148, 149.
John *v.* City Nat'l Bank, 62 Ala. 529, § 844.
Johns *v.* Reardon, 3 Md. Ch. 57, §§ 112, 125.
v. Scott, 5 Md. 81, § 3.
Johnson *v.* Baker, 38 Ill. 98, § 1143.
v. Bloodgood, 1 Johns. Cas. 51, § 440.
v. Chambers, 12 Ind. 102, § 1404.
v. Clarke, 18 Kan. 157, §§ 65*a*, 96, 273, 277.
v. Common Council, 16 Ind. 56, § 1412.
v. Gwathmey, 4 Litt. 317, § 307.
v. Jones, 4 Barb. 369, §§ 658, 668.
v. Jones, 2 Neb. 126, §§ 1369, 1378.
v. Lafflin, 6 L. J. 124 (5 Dill. 65); 103 U. S. 800, § 676.
v. Monell, 13 Ia. 300, § 1354.
v. Powers, 40 Vt. 611, § 72.
v. Reese, 28 Ga. 353, § 1086.
v. Robertson, 31 Md. 476, § 1417.
v. Thweatt, 18 Ala. 741, §§ 313, 328, 334.
v. Way, 4 Am. L. 758, § 80.
Johnson Co. *v.* Thayer, 5 Cent. L. J. 245, § 676.
Johnston *v.* Chapman, 3 Pa. 18, § 421.
v. Glancy, 4 Blackf. 94, §§ 44, 273.
Johnstone *v.* Huddlestone, 4 B. & C. 922, §§ 629, 645.
Jolland *v.* Stainbridge, 3 Ves. Jr. 478, §§ 29, 245, 258.
Jolley *v.* Taylor, 1 Camp. 143, § 1264.
Jones *v.* Bamford, 21 Ia. 217, §§ 185, 672, 690.

Jones *v.* Berryhill, 25 Ia. 289, § 94*a*.
v. Byrd, 74 Ill. 115, § 1161.
v. Chiles, 2 Dana, 25, § 343.
v. Earl, 37 Cal. 630, § 457.
v. Fales, 4 Mass. 245, § 1397.
v. Galis' Curax'r, 4 Mont. 635, § 141.
v. Hays, 4 McLean, 521, § 1404.
v. Johnson, etc. Co. 8 Neb. 451, § 96.
v. Lapham, 15 Kan. 540, §§ 3, 261.
v. Lewis, 8 W. & S. 14, § 876.
v. Love, 9 Cal. 68, § 1253.
v. Marks, 47 Cal. 242, §§ 96, 273.
v. Mansker, 15 La. 51, § 851.
v. Marsh, 4 T. R. 464, § 640.
v. McNarrin, 68 Me. 334, §§ 351, 374.
v. Middleton, 29 Ia. 188, § 738.
v. O'Brien, 26 Eng. L. & Eq. 283, § 967.
v. Roberts, 65 Me. 273, §§ 119, 143.
v. Smith, 1 Hare, 43, §§ 11, 34, 35, 40, 281, 282, 284, 288.
v. Vorhees, 10 Ohio, 145, §§ 552, 558.
v. Wardell, 6 W. & S. 399, § 821.
v. Williams, 11 M. & W. 176, § 480*h*.
v. Williams, 24 Beav. 47, §§ 11, 35, 47, 65*a*.
v. Witter, 13 Mass. 304, §§ 430, 432, 442.
Jordan *v.* Black, 2 Murph. (N. C.) 30, § 431.
v. Gillen, 44 N. H. 424, § 428.
v. Mead, 2 Ala. 427, § 231.
Jordon *v.* Hazard, 10 Ala. 221, § 1230.
v. James, 5 Ohio, 98, § 464.
Joyce *v.* Joyce, 5 Cal. 449, § 1412.
Judah *v.* Judd, 5 Day, 534, §§ 436, 438.
v. Stephenson, 10 Ia. 492, §§ 1084, 1138.
Judd *v.* Woodruff, 2 Root, 298, § 156.
Judson *v.* Corcoran, 17 How. 612, § 440.
v. Dada, 79 N. Y. 373, §§ 96, 324.
Jumel *v.* Jumel, 7 Paige, 591, § 310.
Justice *v.* Elstob, 1 Fost. & F. 256, § 1282.

K.

Kaine *v.* Denniston, 22 Pa. St. 202, §§ 316, 323.
Kamena *v.* Kuelbig, 23 N. J. Eq. 78, § 431.
Kamm *v.* Stark, 1 Sawyer, 547, § 1323.
Kane *v.* Roberts, 40 Md. 590, § 96.
Kansas City, etc. Co. *v.* Simpson, 2 Pac. Rep. 821, § 558.
Kansas City, St. J. & C. B. R. *v.* Campbell, 62 Mo. 585, § 1316.
Karr *v.* Karr, 19 N. J. Eq. 427, § 1148.
Kasson *v.* Smith, 8 Wend. 437, §§ 92*a*, 94*b*.
Kay *v.* Allen, 9 Pa. St. 320, § 392.
Kearney *v.* Vaughn, 50 Mo. 284, § 316.
Keenan *v.* Mo. Ins. Co. 12 Ia. 126, § 678.
Keeney *v.* Lyon, 21 Ia. 277, § 1188.
Kehler *v.* Jack Manf. Co. 55 Ga. 639, § 1136.
Kellar *v.* Savage, 20 Me. 199, §§ 1265, 1280.
Keller *v.* Nutz, 5 S. & R. 246, §§ 206, 210.
Kelley *v.* Brown, 5 Gray, 108, § 957.
v. Storey, 6 Heisk. 202, § 1411.
Kellogg *v.* Corrico, 47 Mo. 157, § 1066.
v. Fancher, 23 Wis. 21, § 372.
v. McLaughlin, 8 Ohio, 114, § 1120.
v. Putnam, 11 Mich. 344, § 1204.
v. Smith, 26 N. Y. 18, §§ 65*a*, 431.
v. Stockton, 29 Pa. St. 460, § 391.
Kellum *v.* Smith, 39 Pa. St. 241, § 1226.
Kelly *v.* Mills, 41 Miss. 267, §§ 103, 233.
Kemble *v.* Wallis, 10 Wend. 374, § 1389.
Kemeys *v.* Richards, 11 Barb. 312, § 528.
Kemp *v.* Derrett, 3 Camp. 510, §§ 607, 610, 633.
Kendall *v.* Lawrence, 22 Pick. 540, §§ 281, 288, 290, 294.
Kenedy *v.* Northrup, 15 Ill. 148, § 217.
Kennedy *v.* Green, 3 M. & K. 699, §§ 31, 37, 688, 690.
v. Bohannon, 11 B. Mon. 118, § 492.

Kennedy *v.* Daly, 1 Sch. & Lef. 355, §§ 50. 63.
v. Parke, 17 N. J. Eq. 415, § 436.
Kenney *v.* Alvater, 77 Pa. St. 34, § 500.
v. Browne, 3 Ridg. P. C. 512. § 34.
Kent *v.* Plumer, 7 Me. 464, § 305.
v. Warner, 12 Allen, 561, § 1397.
Kepler *v.* Davis, 80 Pa. St. 153, § 50.
Keppel's Adm'rs *v.* Pittsburg R. Co. Chase's Dec. 167, § 1411.
Kermott *v.* Ayer, 11 Mich. 181, § 1417.
Kern *v.* Hazerigg, 11 Ind. 443, § 344.
Kerns *v.* Swope, 2 Watts, 75, §§ 12, 30, 192.
Kerr *v.* Clark, 19 Mo. 132, § 613.
v. Day, 14 Pa. St. 112, §§ 278, 286, 294, 303.
v. Hitt, 75 Ill. 51, § 1066.
v. Kitchen, 17 Pa. St. 433, §§ 307, 308.
v. Lord Dungannan, 1 Dr. & War. 509, § 660.
v. McGuire, 28 N. Y. 446, § 1284.
v. Willan, 2 Stark. 53, §§ 538, 544.
Ketchum *v.* Am. Ex. Co. 52 Mo. 390, § 558.
v. Clark, 6 Johns. 144, §§ 486, 513. 519.
Kessel *v.* Albetis, 56 Barb. 362, § 1404.
Key *v.* Flint, 8 Taunt. 21, § 94*a*.
Keys *v.* Test. 33 Ill. 316, § 273.
Kidd *v.* Manley, 28 Miss. 156, § 1405.
Kidder *v.* Blaisdell, 45 Me. 461, § 1411.
v. Peoria, 29 Ill. 77, § 1127.
Kieffer *v.* Ehler, 18 Pa. St. 388, § 372.
Killep *v.* Empire Mill Co. 2 Nev. 34, §§ 1190, 1198.
Killey *v.* Wilson, 33 Cal. 690, § 273.
Kilpatrick *v.* Commonwealth, 31 Pa. St. 198, § 1412.
Kimball *v.* Blaisdell, 5 N. H. 533, §§ 214, 216.
v. Railroad, 26 Vt. 247, § 553.
Kimbro *v.* Lytle, 10 Yerg. 417, § 94*b*.
Kimbrough *v.* Davis, 34 Ala. 583, § 434.
Kimpton *v.* Glover, 41 Vt. 283, § 1234.
Kincheloe *v.* Holmes, 7 B. Mon. 5, § 1388.
Kinderley *v.* Jervis, 22 Beav. 1, § 434.
King *v.* Arundel, Hob. 109, § 1404.
v. Bill, 28 Conn. 593, §§ 342, 347, 348.
v. Connolly, 44 Cal. 236, § 637.
v. Harrington, 14 Mich. 532, §§ 1046, 1081.
v. Kent, 29 Ala. 542, § 1410.
v. Kerr, 5 Ohio, 154, § 480*c*.
v. Lowry, 20 Barb. 532, §§ 1272, 1291.
v. Luffe, 8 East, 193, § 1415.
v. Portis, 77 N. C. 25, § 192.
v. Ritchie, 18 Wis. 554, § 1243.
Kingsbury *v.* Smith, 13 N. H. 109, § 1223.
Kinning *v.* Buchanan, 8 C. B. 271; Sm. Lead Cas. 839, § 1161.
Kinning, *Ex parte*, 4 C. B. 507, § 1161.
Kinsley *v.* Robinson, 21 Pick. 327, § 1004.
Kipp *v.* Fullerton, 4 Minn. 473, § 1383.
Kirkland *v.* Dinsmore, 62 N. Y. 171, § 554.
Kirkpatrick *v.* McCollough, 3 Humph. 171, § 738.
Kirkwood *v.* Reedy, 10 Kan. 453, § 1381.
Kiser *v.* Heuston, 38 Ill. 252, §§ 113, 255.
Kitchen *v.* Crawford, 13 Tex. 516, § 1082.
Kitsmiller *v.* Kitchen, 24 Ia. 163, § 1149.
Klare *v.* State, 43 Ind. 483. § 1415.
Kleeman *v.* Frisbie, 63 Ill. 482, § 431.
Kleinmann *v.* Boerstein, 32 Mo. 311, § 860.
Klemm *v.* Dewes, 28 Ill. 317, § 1138.
Knapp *v.* Runalls, 37 Wis. 135, § 960.
Knarr *v.* Conway, 37 Ind. 257, § 1219.
Knell *v.* Building Ass'n, 34 Md. 67, § 225.
Knight *v.* Bowyer, 2 D. & J. 450, § 281.
v. Pocock, 24 Beav. 436, § 240.
Knouff *v.* Thompson, 10 Pa. St. 57, § 230.
Knowles *v.* Gaslight & Coke Co. 19 Wall. 58, § 1379.
v. Rablin, 20 Ia. 101, § 344.
Knox *v.* Miller, 18 Wis. 397, § 1371.
v. Thompson, 1 Litt. 350, §§ 44, 278.

Koeler *v.* Bernicker, 63 Mo. 368, § 349.
Kohl *v.* Lynn, 34 Mich. 360, § 77.
Kohn *v.* Packard, 3 La. 224, §§ 574, 577*a*.
Kollman *v.* Ex. Co. 3 Kan. 205, § 553.
Konig *v.* Bayard, 1 Pet. 250, § 711.
Koons *v.* Grooves, 20 Ia. 373, § 96.
Kramer *v.* Farm. & Mech. Bank, 15 Ohio, 253, § 180.
v. Sandford, 4 Watts & S. 328, § 943.
Kramph *v.* Hatz, 52 Pa. St. 525, §§ 386, 421.
Krider *v.* Lafferty, 1 Whart. 303, §§ 246, 280.
Kyle *v.* Green, 14 Ohio, 495, §§ 943, 944.
v. Thompson, 11 Ohio St. 610, § 208.

L.

La Croix *v.* Sarrazin, 15 Fed. Rep. 489, § 1406.
Lacustrine, etc. Co. *v.* Lake Gano, etc. Co. 82 N. Y. 476, § 96.
Ladd *v.* Kenney, 2 N. H. 340, §§ 961, 975.
Ladley *v.* Creighton, 70 Pa. St. 490, § 123.
Lady Superior *v.* McNamara, 3 Barb. Ch. 375, § 143*a*.
La Farge Ins. Co. *v.* Bell, 22 Barb. 54, §§ 683*a*, 688.
Lafayette Ins. Co. *v.* French, 18 How. 404, §§ 1302, 1303.
Lafitte *v.* Slatter, 6 Bing. 623; 4 Moore & P. 457, §§ 991, 1004, 1010.
La Grange *v.* Chapman, 11 Mich. 499, § 1411.
Lagrave's Case, 14 Abb. Pr. 334; 45 How. Pr. 301, § 1358.
Laing *v.* Coldar, 8 Pa. St. 479, § 541.
Laithe *v.* McDonald, 7 Kan. 254, § 1249.
Lake *v.* Calhoun Co. 52 Ala. 115, § 1417.
v. Reed, 29 Ia. 258, § 80.
Lake Merced Water Co. *v.* Cowles, 31 Cal. 215, § 1414.
Lally *v.* Holland, 1 Swan, 396, §§ 149, 174.
Lamb *v.* Pierce, 113 Mass. 72, §§ 14, 244.
v. Rudd, 37 Ia. 618, § 94*b*.
Lamb *v.* Western R. Co. 7 Allen, 98, § 566.
Lambert *v.* Ghiselin, 9 How. 552, § 990.
v. Newman, 56 Ala. 623, §§ 10, 29.
v. Sample, 25 Ohio St. 336, § 1347.
Lamkin *v.* Phillips, 9 Port. 98, § 434.
Lamont *v.* Cheshire, 65 N. Y. 30, § 49.
v. Stimson, 5 Wis. 443, §§ 7, 11, 29.
Lamphere *v.* Cowen, 42 Vt. 175, §§ 418, 1390.
Landers *v.* Boulton, 26 Cal. 393, § 96.
Landes *v.* Brant, 10 How. 348, §§ 44, 273.
Lane *v.* Jackson, 5 Mass. 157, § 466.
v. Jackson, 20 Beav. 535, § 375.
v. Mason, 5 Leigh, 520, § 101.
v. Steward, 20 Me. 98, §§ 939, 941.
Lanfier *v.* Mestier, 18 La. An. 497, § 1401.
Langan *v.* Hewett, 13 Sm. & M. 122, § 525.
Langdale *v.* Trimmer, 15 East, 291, §§ 716, 794, 817.
Langdon *v.* Poor, 20 Vt. 13, §§ 1107, 1109.
v. Woodfield, 2 B. Mon. 105, § 48.
Lange *v.* Kennedy, 20 Wis. 279, § 499.
Langton *v.* Horton, 1 Hare, 549, § 433.
Lank *v.* Hiles, 4 Houst. (Del.) 87, § 269.
Lansing *v.* Gaine, 2 Johns. 300, §§ 483, 513.
Laporte *v.* Landry, 5 Mart. (La.) N. S. 359, § 879.
Laporte City *v.* Goodfellow, 47 Ia. 572, § 1409.
Larabee *v.* Searsport, 42 Me. 202, § 1400.
Large *v.* Moore, 17 Ia. 258, § 434.
Larkin, *Ex parte*, L. R. 14 Ch. Div. 566, § 672.
Larrabee *v.* Morrison, 15 Minn. 196, § 1209.
Lassell *v.* Burnett, 1 Blackf. 150, § 8.
Lathrop *v.* Mitchell, 47 Ga. 610, §§ 1259, 1281.
Latouch *v.* Lord Dunsany, 1 Sch. & Lef. 159, § 104.

Lavalle *v.* People, 6 Ill. App. 157, § 1404.
Laverone *v.* Mangianti, 41 Cal. 138, § 480*i*.
Lawler *v.* Whette, 1 Handy, 29, § 1058.
Lawrence *v.* Bowman, 1 McAllister C. Ct. 419, §§ 1324, 1325.
v. Clark, 14 M. & W. 250, § 1287.
v. Ralston, 3 Bibb, 102, §§ 956, 966.
v. State, 30 Ark. 719, § 1031.
v. Tucker, 7 Me. 195, §§ 96, 674, 688.
Lawson *v.* Farmers' Bank, 1 Ohio St. 206, §§ 11, 716, 805, 811.
v. Townes, 2 Ala. 373, § 397.
v. Weston, 4 Esp. 56, §§ 80, 81.
Lawton *v.* Gordon, 37 Cal. 202, §§ 3, 28, 65, 66, 96, 244.
Layer's Case, 1 Leach Cr. Cas. 336, § 1261.
Lazier *v.* Westcott, 26 N. Y. 146, § 1414.
Lea *v.* Polk Co. Copper Co. 21 How. 493, §§ 44, 273.
Leach *v.* Beattie, 33 Vt. 195, §§ 203, 208.
v. Hewitt, 4 Taunt. 731, § 1017.
Leach's App. 44 Pa. St. 140, § 147.
Leason *v.* Holt, 1 Stark. 186, §§ 536, 537.
Leathers *v.* Commercial Ins. Co. 2 Bush, 296, § 981.
Leavenworth, etc. R. *v.* Maris, 16 Kan. 333, §
Leavitt *v.* Peck, 3 Conn. 124, § 525.
v. Putnam, 3 N. Y. 494, § 738.
v. Simes, 3 N. H. 14, § 1281.
Lee *v.* Averell, 1 Sandf. 731, § 348.
v. Cato, 27 Ga. 637, § 225.
v. Dick, 10 Pet. 482, §§ 395, 396.
v. Green, 6 De G. M. & G. 155, §§ 240, 375.
v. Howlett, 2 K. & J. 531, §§ 7, 35.
v. Marsh, 43 Barb. 102, § 553.
Lee Co. *v.* Rogers, 7 Wall. 181, §§ 357, 375.
Leeds *v.* Cameron, 3 Sumn. 488, § 272.
Leffingwell *v.* White, 1 Johns. Cas. 99, § 938.
Legge *v.* Thorpe, 12 East, 171, §§ 1004, 1009.
Leggett *v.* Bullock, Busb. L. 283, § 231*a*.
Le Grand *v.* Hampden Sidney Col. 5 Munf. 324, §§ 1408, 1409.
Leiby *v.* Wolf, 10 Ohio, 83, §§ 205, 223.
Leiman's Estate, 32 Md. 225, §§ 17, 225.
Leitch *v.* Wells, 48 Barb. 637, § 341; (48 N. Y. 585), § 371.
Le Marchand's Case, 1 Leach Cr. Cas. 336, § 1261.
Lemke *v.* Railroad, 39 Wis. 449, § 570.
Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. Sr. 64; White & T. Lead. Cas. in Eq. 109, §§ 50, 231*a*, 687, 690.
Lenheim *v.* Fay, 27 Mich. 70, § 94*a*.
Lenoir *v.* Broadhead, 50 Ala. 58, § 1367.
Lenox *v.* Roberts, 2 Wheat. 373, §§ 779, 814.
Lent *v.* Padleford, 10 Mass. 230, § 1387.
Leonard *v.* Gary, 10 Wend. 504, § 956.
v. Shirts, 33 Ind. 214, § 416.
Leppoc *v.* Nat'l Union Bank, 32 Ind. 136, § 225.
Le Roy *v.* Johnson, 2 Pet. 186, §§ 483, 524.
Lesassier *v.* The Southwestern, 2 Woods, 35, § 473.
Lesem *v.* Herriford, 44 Mo. 323, § 67.
Lessee of Allen *v.* Parish, 3 Ohio, 107, § 225.
Lester *v.* Hardesty, 29 Md. 50, § 225.
Leverich *v.* Mayor of New York, 66 Barb. 623, § 657.
Levy *v.* Cohen, 4 Ga. 1, § 383.
v. State, 6 Ind. 281, § 1404.
Lewin *v.* Dills, 17 Mo. 64, § 1250.
Lewis *v.* Baird, 3 McLean, 56, §§ 119, 192.
v. Bakewell, 6 La. An. 359, § 768.
v. Bond, 18 Beav. 85, §§ 46, 282.
v. Boskins, 27 Ark. 61, § 316.
v. Botkin, 4 W. Va. 533, § 1375.
v. Bradford, 10 Watts, 67, §§ 11, 28, 278.
v. Dwight, 10 Conn. 95, § 402.
v. Grace, 44 Ala. 307, § 1153.
v. Harris, 31 Ala. 689, § 1411.
v. Madison, 1 Munf. 303, § 351.
v. McClure, 8 Oreg. 273, § 1417.
v. Mew, 1 Strob. Eq. 180, § 351.

Lewis *v.* The Success, 18 La. An. 1, § 480*n*.
v. Wintrode, 76 Ind. 13, § 1414.
Lewiston Falls Bank *v.* Leonard, 43 Me. 141, § 892.
Libby *v.* Pierce, 47 N. H. 309, §§ 740, 741.
Life Ins. Co. *v.* Pooly, 5 Jur. N. S. 129, § 431.
v. Rowand, 26 N. J. Eq. 389, § 142.
Life & Fire Ins. Co. *v.* Mechanics' Life Ins. Co. 7 Wend. 31, § 1280.
Light *v.* Kingsbury, 50 Mo. 331, § 738.
Lightner *v.* Mooney, 10 Watts, 407, §§ 196, 278, 295.
Likens *v.* McCormick, 39 Wis. 313, §§ 1030, 1355.
Lilley *v.* Miller, 2 Nott & McC. 257, § 1009.
Lilliard *v.* Ruckers, 9 Yerg. 64, § 215.
Lime Rock Bank *v.* Hewitt, 52 Me. 51, §§ 480*o*. 874.
v. Plimpton, 17 Pick. 159, § 655.
Lincoln, etc. Ass'n *v.* Hass, 10 Neb. 583, § 96.
Lindaur *v.* Mut. Safety Ins. Co. 3 Ark. 461, § 1235.
Lindenburger *v.* Beall, 6 Wheat. 104, §§ 781, 882.
Linderman *v.* Guldin, 34 Pa. St. 54, § 767.
Lindo *v.* Unsworth, 2 Camp. 602, § 819.
Lindsay *v.* Attorney-General, 33 Miss. 508, § 1412.
Linville *v.* Welch, 29 Mo. 203, § 109.
Lisher *v.* Parmelee, 1 Wend. 22, § 1166.
Lisk *v.* Woodruff, 15 Ill. 15, § 480*c*.
Litchfield *v.* Burwell, 5 How. Pr. 346, § 1413.
Litt *v.* Cowley, 7 Taunt. 169, §§ 463, 470.
Little *v.* Clarke, 36 Pa. St. 114, § 504.
v. Page, 44 Mo. 412, § 72.
Littlefield *v.* Smith, 17 Me. 327, § 436.
Littleton *v.* Giddings, 47 Tex. 109, §§ 11, 36, 65*a*, 279.
Livingston *v.* Dean, 2 Johns. Ch. 479, § 431.
Livingstone *v.* Tanner, 14 N. Y. 64, § 597.
Lloyd *v.* Atwood, 3 De G. & J. 614, §§ 674, 688.
Lloyd *v.* Banks, L. R. 3 Ch. 488, §§ 3, 8, 433.
v. Hooper, 7 East, 624, § 1181.
v. Waterford & Limerick R. Co. 9 Law T. (N. S.) 89, § 560.
Loan & Trust Co. *v.* Maltby, 8 Paige, 361, § 214.
Lockwood *v.* Crawford, 18 Conn. 361, § 738.
Lodge *v.* Simonton, 2 Pa. 439, §§ 321, 324.
Logan *v.* Herron, 8 S. & R. 459, §§ 581, 608.
v. Williams, 76 Ill. 175, § 127.
Lohman *v.* State, 81 Ind. 15, § 1417.
Lollar *v.* Jauvrin, 47 N. H. 324, § 480*o*.
London & N. W. R. Co. *v.* Bartlett, 7 H. & N. 400, §§ 462. 464.
v. Dunham, 18 C. B. 826, § 561.
Lonergan *v.* Stewart, 55 Ill. 44, § 480*o*.
Long *v.* Dollarhide, 24 Cal. 218, §§ 205, 210.
v. Railroad, 50 N. Y. 76, § 554.
v. Stapp, 49 Mo. 508, § 280.
v. Weller, 29 Gratt. 347, § 307.
Loomis *v.* Eagle Bank, 2 Disney (Ohio), 285, § 683*a*.
v. Loomis, 26 Vt. 198, § 436.
v. Monry, 15 N. Y. 312, § 94*a*.
v. Riley, 24 Ill. 307, § 344.
Loose *v.* Loose, 36 Pa. St. 538, § 972.
Lord *v.* Ocean Bank, 20 Pa. St. 384, § 94*a*.
Losey *v.* Simpson, 11 N. J. Eq. 246, §§ 205, 207, 210, 690.
Loud *v.* Merrill, 45 Me. 516, § 821.
Loudon *v.* Tiffany, 5 Watts & S. 367, § 431.
Loughridge *v.* Bowland, 52 Miss. 546, §§ 29, 273, 302.
Louisiana State Bank *v.* Buhler, 22 La. An. 83, § 1004.
v. Ellery, 4 Mart. N. S. (La.) 87, § 749.
v. Rowel, 6 Mart. N. S. (La.) 506, § 880.
v. Senecal, 13 La. 525, §§ 683, 683*a*.
Louisville Manf. Co. *v.* Welch, 10 How. 461, §§ 406, 411, 426.
Loveland *v.* Burk, 120 Mass. 139, § 576.
Lovejoy *v.* Lunt, 48 Me. 377, §§ 1031, 1119.
v. Spafford, 4 Cent. L. J. 80; 93 U. S. 430, § 519.

Loveridge *v.* Cooper, 3 Russ. 31, § 433.
Low *v.* Blinco, 10 Bush, 331, §§ 232, 266.
v. Howard, 10 Cush. 159, § 958.
v. Pratt, 53 Ill. 438, § 351.
Lowe *v.* Beckwith, 14 B. Mon. 184, §§ 390, 407, 409.
Lowery *v.* Scott, 24 Wend. 358, § 918.
Lowry *v.* Brown, 1 Cold. 456, § 13.
v. Steele, 27 Ind. 168, § 936.
Lowther *v.* Carlton, 2 Atk. 242, §§ 29, 62, 348.
v. Commonwealth, 1 Hen. & Munf. 202, § 480*c*.
Loyd *v.* Anglin, 7 Yerg. (Tenn.) 428, § 1097.
Luckin *v.* Commonwealth, 4 Bush, 440, § 1409.
Ludlow *v.* Kidd, 3 Ohio, 541, § 358.
v. Van Ness, 8 Bosw. 178, §§ 97, 103.
Lufkins *v.* Collins, 6 W. Coast Rep. 594, § 440.
Lumbert *v.* Palmer, 29 Ia. 104, § 1397.
Lundie *v.* Robertson, 7 East, 231, § 975.
Luther *v.* McMichael, 16 Humph. 298, § 1093.
Lyendecker *v.* Martin, 38 Tex. 287, § 1151.
Lyle *v.* Bradford, 7 Mon. 111, § 348.
Lyon *v.* Johnson, 28 Conn. 1, §§ 505, 512.
Lysaght *v.* Bryant, 2 Carr. & Kir. 1016, § 722.
Lyttle *v.* Pope, 11 B. Mon. 297, § 348.

M.

Mac *v.* Titcomb, 19 Ind. 135, § 1404.
Macey *v.* Fenwick, 9 Dana, 198, §§ 355, 373.
Macklin *v.* Waterhouse, 5 Bing. 212, § 544.
Mackreth *v.* Symmons, 15 Ves. 350, § 50.
Mackubin *v.* Smith, 5 Minn. 376, §§ 1041, 1042.
Macon *v.* Sheppard, 2 Humph. 335, §§ 273, 278, 289, 305.
Mactier *v.* Frith, 6 Wend. 103, § 383.
Madden *v.* Fielding, 9 La. An. 505, § 1138.
Maddox *v.* Humphries, 30 Tex. 494, § 348.
Madison Co. Com'rs *v.* Burford, 93 Ind. 383, § 1404.
Magee *v.* Badger, 34 N. Y. 247, § 80.
v. Railroad, 45 N. Y. 514, § 554.
Magill *v.* Merrie, 5 B. Mon. 168, § 494.
Mahew *v.* Eames, 3 B. & C. 601, § 551.
Mahoney *v.* Middleton, 41 Cal. 41, §§ 96, 203, 231*a*.
Maignan *v.* Railroad, 24 La. An. 333, § 570.
Maitland *v.* Backhouse, 17 L. J. Ch. 121, § 10.
Major *v.* Bukley, 51 Mo. 227, §§ 65*a*, 307.
v. State, 2 Sneed, 11, § 1413.
Majors *v.* Cowell, 51 Cal. 478, § 374.
Malick *v.* Tower Grove, etc. R. Co. 57 Mo. 17, §§ 480*k*, 695.
Mallory *v.* Stoddard, 6 Ala. 801, § 143*a*.
Malpas *v.* Ackland, 3 Russ. 273, §§ 15, 307.
Mammon *v.* Hartman, 51 Mo. 168, § 87.
Manchester Bank *v.* Fellows, 28 N. H. 302, §§ 794, 797.
v. Oliver, 10 Cush. 557, § 924.
Mangles *v.* Dixon, 3 H. L. Cas. 702, §§ 10, 431.
Mann *v.* Best, 62 Mo. 491, § 239.
v. Moors, Ry. & Mood. 249, § 926.
Manning *v.* Gasharie, 27 Ind. 399, §§ 1236, 1417.
Mansfield *v.* Gregory, 8 Neb. 435, § 96.
Manufacturers' Bank *v.* Bank of Pa. 7 W. & S. 335, § 186.
v. Hazard, 30 N. Y. 226, § 925.
Manufacturers' Nat. Bank *v.* Barnes, 65 Ill. 69; 16 Am. Rep. 576, § 671*a*.
Manwairing *v.* Sands, 1 Str. 706, § 671.
Mara *v.* Pierce, 9 Gray, 306, § 274.
Marberger *v.* Pott, 16 Pa. St. 9, § 422.
March *v.* Putney, 56 N. H. 34, §§ 402, 426.
Market Bank *v.* Pacific Bank, 27 Hun, 465, § 1417.
Markward *v.* Doriat, 21 Ohio St. 637, § 1190.
Marlett *v.* Jackman, 3 Allen, 287, § 498.
Marlin *v.* Maynard, 16 N. H. 165, § 480*n*.

Marlow *v.* Marlow, 77 Ill. 633, §§ 1257, 1291.
Marseilles, etc. Co. *In re*, L. R. 7 Ch. 161, § 674.
Marsh *v.* Austin, 1 Allen, 232, § 143*a*.
v. Cohen, 68 N. C. 283, § 1216.
v. Maxwell, 2 Camp. 210, § 799.
Marsh's Adm'rs *v.* Bast, 41 Mo. 493, § 1358.
Marshall *v.* Baker, 3 Minn. 320, § 821.
v. Columbia Ins. Co. 27 N. H. 157, § 683*a*.
v. Fisk, 6 Mass. 24, § 96.
v. Mitchell, 34 Me. 227; 35 Me. 221, §§ 941, 946.
v. Roberts, 18 Minn. 405; 10 Am. Rep. 201, § 203.
Marston *v.* Hobbs, 2 Mass. 433, § 480*c*.
Martalet *v.* Clary, 20 Ark. 251, § 480*l*.
Martin *v.* Boyd, 11 N. H. 385, § 87.
v. Cotter, 3 Jones & L. 496, § 321.
v. Hall, 26 Mo. 386, § 480*n*.
v. Jackson, 3 Casey, 504, §§ 288, 290.
v. Martin, 51 Me. 366, § 1411.
v. Nash, 31 Miss. 324, § 326.
v. Richardson, 68 N. C. 255, § 431.
v. Sale, 1 Bailey's Eq. 1, § 226.
v. Sedgwick, 9 Beav. 333, § 433.
v. Stiles, 11 Ves. Ch. 194, § 344.
v. Winslow, 2 Mason, 241, § 957.
Martindale *v.* Price, 14 Ind. 115, §§ 116, 175.
Marvin *v.* Adamson, 11 Ia. 371, §§ 420, 422.
Mary Washington, The, Chase's Dec. 125, §§ 571, 573, 576.
Mason *v.* Martin, 4 Md. 124, § 97.
v. Paine, Walk. Ch. 453, §§ 15, 308.
v. Pritchard, 2 Camp. 436, § 410.
Maspero *v.* Pedesclaux, 22 La. An. 227, § 765.
Massachusetts Bank *v.* Oliver, 10 Cush. 557, § 763.
Massey *v.* McIlwain, 2 Hill's Ch. 421, § 305.
v. Thompson, 2 Nott & McC. 105, § 101.
v. Turner, 2 Houst. 79, § 87.
Massie *v.* Greenhow, 2 Pat. & H. 255, §§ 8, 29.
Masters *v.* Warren, 27 Conn. 293, § 1239.
Masterson *v.* Ellington, 10 Mo. 712, § 1211.
v. Herndon, 10 Wall. 416, §§ 1209, 1219.
v. Le Claire, 4 Minn. 163, § 1413.
Mathews *v.* Allen, 16 Gray, 594, § 956.
Matteson *v.* Smith, 37 Wis. 333, §§ 1346, 1371.
Matthew *v.* Dare, 20 Md. 248, § 1225.
Matthews *v.* Demerritt, 22 Me. 312, §§ 281, 294.
v. Houghton, 10 Me. 420, § 442.
Maul *v.* Rider, 59 Pa. St. 167, §§ 29, 210, 279.
Maupin *v.* Emmons, 47 Mo. 304, §§ 12, 16, 17, 244, 673*a*.
Maundrell *v.* Maundrell, 10 Ves. 260, § 57.
Maving *v.* Todd, 1 Stark. 72, § 536.
Maxfield *v.* Burton, L. R. 17 Eq. 15, §§ 56, 65*a*.
May *v.* Boisseau, 8 Leigh, 164, § 953.
v. Borel, 12 Cal. 91, § 689.
v. Burdett, 9 Q. B. 101; 1 Halo P. C. 430, § 480*i*.
v. Coffin, 4 Mass. 341, § 991.
v. Le Claire, 11 Wall. 217, § 316.
v. McKeenon, 6 Humph. 209, § 96.
Mayberry *v.* Morris, 62 Ala. 113, § 372.
Maybin *v.* Kirby, 4 Rich. Eq. 105, § 10.
Mayfield *v.* Wheeler, 37 Tex. 256, § 390.
Mayham *v.* Coombs, 14 Ohio, 428, §§ 225, 231*a*, 245, 248.
Mayo *v.* Cartwright, 30 Ark. 407, § 97.
Mayor, etc. *v.* Murray, 7 De G. M. & G. 497, § 11.
v. Williams, 6 Md. 235, §§ 17, 40, 118, 226.
McAndrew *v.* Whitlock, 52 N. Y. 40, § 564.
McAnnelly *v.* Chapman, 18 Tex. 198, § 67.
McArthur *v.* Dudgeon, 15 Eq. Cas. 102, § 1207.
McAteer *v.* McMullen, 2 Pa. St. 32, §§ 319, 324.
McCabe *v.* Grey, 20 Cal. 509, §§ 97, 208.
v. Le Compt, 15 Mo. 78, § 1211.
McCamant *v.* Patterson, 39 Mo. 100, §§ 219, 222.

McCann *v.* Railroad, 20 Md. 202, § 553.
McCarthy *v.* Railroad, 30 Pa. St. 247, § 566.
McClane *v.* Fitch, 4 B. Mon. 599, § 781.
McClean *v.* Hertzog, 6 S. & R. 154, § 1263.
McClosky *v.* Cobb, 2 Bond, 16, § 1356.
McClure *v.* Thistle, 2 Gratt. 182, § 101.
v. Wells, 46 Mo. 311, § 1381.
McClurg *v.* Phillips, 57 Mo. 214, §§ 140, 211.
McCollum *v.* Cushing, 22 Ark. 540, § 1388.
McComb *v.* Thompson, 2 Minn. 139, § 87.
McConnell *v.* Downs, 48 Ill. 271, § 480*c*.
v. Reed, 5 Ill. 117, § 307.
v. Stettinius, 7 Ill. 707, § 1245.
McCord *v.* Beatty, 12 Ia. 299, § 434.
McCormac *v.* Irwin, 35 Pa. St. 111, § 1253.
v. Wheeler, 36 Ill. 114, §§ 674, 688, 692.
McCoy *v.* Trustees, 5 S. & R. 254, §§ 205, 223.
McCrummen *v.* McCrummen, 5 Mart. (La.) N. S. 158, § 879.
McCulloch *v.* Cowher, 5 Watts & S. 427, § 273.
v. Eagle Ins. Co. 1 Pick. 278, § 384.
v. Eudalay, 3 Yerg. 346, § 217.
v. Gregory, 1 Kay & J. 286, § 35.
McCutchen *v.* McGahay, 11 Johns. 281, § 671.
v. Miller, 31 Miss. 65, §§ 342*a*, 353.
McDaniel *v.* Carrell, 19 Ill. 226, § 1354.
McDaniels *v.* Flower Brook Man. Co. 22 Vt. 274, § 10.
McDermott *v.* Board of Police, 25 Barb. 635, §§ 1139, 1334.
v. Strong, 4 Johns. Ch. 687, §§ 342*a*, 353.
McDonald *v.* Bailey, 14 Me. 101, § 937.
v. Gaunt, 2 Pac. Rep. 871, § 10.
v. Leach, Kingsley (Conn.), 72, § 155.
v. Western R. Corp. 34 N. Y. 497, § 570.
McDugald *v.* Smith, 11 Ired. (N. C.) 576, § 1227.
McElroy *v.* English, 2 Cranch C. C. 528, § 820.
McFall *v.* Sherrard, Harper, 295, § 101.
McFetridge *v.* Piper, 40 Ia. 627, § 464.
McGehee *v.* Gindrat, 20 Ala. 95, §§ 10, 35.
McGinnis *v.* State, 24 Ind. 500, §§ 1262, 1414.
v. Washington Hall Ass'n, 12 Gratt. 602, § 1239.
McGregor *v.* McGregor, 21 Ia. 441, § 357.
v. Hall, 3 Stew. & P. 397, § 154.
McIlvaine *v.* Legaré, 34 La. An. 923, § 1405.
McIntosh *v.* See, 57 Ia. 156, § 1415.
McIver *v.* Richardson, 1 Maul. & S. 557, § 393.
McKeckine *v.* Hoskins, 23 Me. 230, §§ 294, 299.
McKenzie *v.* Perril, 15 Ohio St. 168, § 273.
McKeon *v.* Lee, 4 Rob. (N. Y.) 449, § 577*a*.
McKewer *v.* Kirtland, 33 Ia. 348, § 738.
McKillip *v.* McIlhenny, 4 Watts, 317, § 1257.
McKinney *v.* Brights, 16 Pa. St. 399, § 3.
v. Crawford, 8 S. & R. 351, § 739.
v. Rutherford, 1 Dev. & Bat. Eq. 14, § 431.
McKinnon *v.* Bliss, 21 N. Y. 206, § 1411.
McLanahan *v.* Reeside, 9 Watts, 508, § 188.
McLaren *v.* Thurman, 8 Ark. 313, § 348.
McLaughlin *v.* Shepherd, 32 Me. 143, §§ 65*a*, 273, 277.
McLeod *v.* First Nat'l Bank, 42 Miss. 99, §§ 30, 65.
McLourine *v.* Monroe, 30 Mo. 462, § 369.
McManus *v.* Lancashire, etc. R'y, 4 H. & N. 327, § 560.
McMechan *v.* Griffing, 3 Pick. 149, §§ 244, 281, 288, 291, 294.
McMillan *v.* M. S. & N. I. R. Co. 16 Mich. 79, §§ 553, 555, 565, 570.
McMurtrie *v.* Jones, 3 Wash. 206, § 843.
McNary *v.* Southworth, 58 Ill. 473, § 316.
McNatt *v.* Jones, 52 Ga. 473, § 871.

McNeilage *v.* Halloway, 1 B. & Ald. 218, § 728.
McNeill *v.* Tenth National Bank, 55 Barb. 59, § 73.
v. Wyatt, 3 Humph. 125, §§ 717, 735.
McNeilly *v.* Cont. Life Ins. Co. 66 N. Y. 23, § 671.
McNichol *v.* Pacific Ex. Co. 12 Mo. App. 401, § 1417.
McPherson *v.* Housel, 2 Beasley, 299, § 339.
McQueen *v.* Farquhar, 11 Ves. 482, § 34.
McRae *v.* Rhodes, 22 Ark. 315, § 1004.
McWilliams *v.* Webb, 32 Ia. 577, § 436.
Mead *v.* Engs. 5 Cow. 303, § 714.
v. Lord Orrery, 3 Atk. 235, § 350.
Mechanics' Bank *v.* Griswold, 7 Wend. 165, §§ 732, 943.
v. Livingston, 33 Barb. 458, § 510.
v. Seaton, 1 Pet. 309, § 672.
v. Schaumburg, 38 Mo. 228, §§ 674, 688.
Mechanics' & Traders' Bank *v.* Gordon, 5 La. An. 604, §§ 480*a*, 542.
Mechanics' & Traders' Bank of N. O. *v.* Compton, 3 Rob. (La.) 4, § 896.
Meehan *v.* Williams, 48 Pa. St. 238, §§ 29, 44, 288, 294, 688.
Meeker *v.* Van Renssalaer, 15 Wend. 397, § 480*h*.
Mellon's Appeal, 32 Pa. St. 121, § 227.
Melvin *v.* Clark, 45 Ala. 285, § 1374.
Mendioca *v.* Orr, 16 Cal. 368, § 1363.
Mentross *v.* Clark, 2 Sandf. 115, § 94*a*.
Mercantile Ins. Co. *v.* Corcoran, 1 Gray, 75, § 440.
Merch *v.* Smith, 7 Wend. 315, § 480*o*.
Merchants' Bank *v.* Birch, 17 Johns. 25, § 766.
v. Easley, 44 Mo. 286, § 1017.
Merchants' Disp. Tr. Co. *v.* Hallock, 64 Ill. 284, § 566.
Merchants' National Bank *v.* Comstock, 55 N. Y. 24, § 94*b*.
Meredith *v.* Santa Clara, etc. Min. Ass'n, 60 Cal. 617, § 1186.
Merriam *v.* H. & N. H. R. Co. 20 Conn. 354, §§ 455, 456, 532.
Merrick *v.* Phillips, 58 Mo. 436, §§ 80, 87.
v. Wallace, 19 Ill. 486, §§ 152, 307.
Merril *v.* Dawson, 1 Hemp. 563, §§ 1246, 1404.
Merrill *v.* Ireland, 40 Me. 569, § 96.
v. Montgomery, 25 Mich. 73, § 1032.
Merrills *v.* Swift, 18 Conn. 257, §§ 180, 181.
Merriman *v.* Hyde, 2 Neb. 120, § 118.
Merritt *v.* White, 37 Miss. 438, § 1367.
Mersey, The, Blatch. Prize Cas. 187, § 1417.
Mertius *v.* Joliffe, Amb. 311, § 313.
Merwin *v.* Smith, 2 N. J. Eq. 182, § 1088.
Merz *v.* Kaiser, 2 La. An. 577, § 855.
Meshke *v.* Van Doren, 16 Wis. 319, § 1414.
Mesick *v.* Sunderland, 6 Cal. 297, §§ 122, 191.
Messenger *v.* Armstrong, 1 T. R. 43, § 649.
v. Penn. R. R. Co. 37 N. J. L. 531, § 555.
Metcalf *v.* Pulvertoft, 2 Ves. & Beam. 200, § 348.
v. Richardson, 2 Eng. L. & Eq. 301, § 831.
v. Smith, 40 Mo. 572, § 348.
Metropolitan Bank *v.* Godfrey, 23 Ill. 579, §§ 284, 299.
Metz *v.* Osborne, 5 Mo. 546, § 975.
v. State Bank, etc. 7 Neb. 171, § 96.
Meux *v.* Anthony, 11 Ark. 411, § 348.
v. Bell, 1 Hare, 73, § 433.
v. Maltby, 2 Sw. 281, § 282.
Meyrick *v.* Woods, Carr. & Marsh. 452, §§ 1286, 1292.
Mich. Cent. R. Co. *v.* Dolan, 32 Mich. 510, § 674.
v. Hale, 6 Mich. 243, § 555.
v. Ward, 2 Mich. 538, § 574.
Michigan, etc. R. *v.* Heaton, 3 Ind. 448, § 553.
Michigan Ins. Co. *v.* Whittimore, 12 Mich. 427, § 1204.
Michigan State Bank *v.* Peck, 28 Vt. 200, § 402.
Middlebury College *v.* Cheney, 1 Vt. 348, § 1405.

Milam *v.* Strickland, 45 Miss. 721, § 1368.
Milbourn *v.* Fouts, 4 Green (Ia.), 346, § 1365.
Miles *v.* Goffinet, 16 Mich. 280, § 1170.
v. Hall, 12 Sm. & M. 332, § 893.
v. Langley, 1 Russ. & My. 39, §§ 65*a*, 288, 303.
Mill *v.* Hill, 12 Jones & L. 107, § 104.
Miller *v.* Bradford, 12 Ia. 14, §§ 148, 149, 167.
v. Cresson, 5 W. & S. 284, §§ 7, 29.
v. Finley, 26 Mich. 255, § 94*a*.
v. Florer, 15 Ohio St. 148, § 431.
v. Graham, 17 Ohio St. 1, § 1109.
v. Hackley, 5 Johns. 375, §§ 975, 1021.
v. Ill. etc. R. Co. 24 Barb. 313, § 683.
v. Kershaw, 1 Bailey's Eq. 479, § 349.
v. Myles, 46 Cal. 535, § 280.
v. Perrine, 1 Hun (N. Y.), 620, § 1314.
v. Race, 1 Burr. 452, § 81.
v. Sherry, 2 Wall. 237, §§ 351, 353.
Stocking, 22 Wend. 623, § 1170.
Milliken *v.* Barr, 7 Pa. St. 23, §§ 1258, 1261.
Mills *v.* Beard, 19 Cal. 158, § 936.
v. Bliss, 55 N. Y. 139, § 374.
v. U. S. Bank, 11 Wheat. 431, §§ 480*o*, 836.
Milton *v.* Rowland, 11 Ala. 732, §§ 1222, 1254.
v. Turner, 38 Tex. 81, § 195.
Mims *v.* Mims, 35 Ala. 23, § 152.
v. Swartz, 37 Tex. 13, § 1404.
Miner *v.* Clark, 15 Wend. 425, § 480*c*.
v. Natchez, 4 S. & M. 602, §§ 1086, 1095.
Mines *v.* West, 38 Ga. 18, § 372.
Minna, The, Blatch. Prize Cas. 333, § 1417.
Minturn *v.* Fisher, 7 Cal. 573, § 938.
Miser *v.* Trovinger, 7 Ohio St. 281, §§ 732, 758, 1004.
Missouri, Kan. & Tex. R. Co. *v.* Crowe, 9 Kan. 496, § 1310.
Missouri Pac. R. Co. *v.* Nevin, 2 Pac. Rep. 795, § 480*a*.
Mitchell *v.* Cross, 2 R. I. 437, § 805.
v. Gray, 18 Ind. 123, §§ 1084, 1138.
Mitchell *v.* Greenwald, 43 Miss. 167, § 1375.
v. Lipe, 8 Yerg. 179, §§ 1097, 1098.
v. Runkle, 25 Tex. Supp. 132, §§ 1138, 1143.
v. Smith, 53 N. Y. 413, § 374.
v. Steward, 35 L. J. Ch. 393, § 30.
v. Woodson, 37 Miss. 567, § 1070.
Mobile, etc. R. Co. *v.* Hopkins, 41 Ala. 486, § 558.
v. Prewitt, 46 Ala. 63, § 566.
v. Weiner, 49 Miss. 725, § 553.
v. Whitney, 39 Ala. 468, § 1405.
Mobley *v.* Clark, 28 Barb. 390, § 1019.
v. Leophart, 47 Ala. 257, § 1065.
Mocatta *v.* Murgatroyd, 1 P. Wms. 393, § 813.
Mochler *v.* Town of Shaftsbury, 46 Vt. 580; 14 Am. Rep. 634, § 480*g*.
Modawell *v.* Holmes, 40 Ala. 391, § 1417.
Mohawk Bank *v.* Broderick, 13 Wend. 133, § 480*o*.
v. Corey, 1 Hill, 513, § 94*b*.
Mohr *v.* Bost. & Alb. R. Co. 106 Mass. 67, § 1019.
v. Chic. & N. W. R. Co. 40 Ia. 579, § 566.
Moline, *Ex parte*, 19 Ves. Ch. 216, §§ 769, 770, 781, 782.
Mollett *v.* Brayne, 2 Camp. 103, § 646.
Molony *v.* Kernon, 2 Dr. & War. 40, § 660.
Monell *v.* Smith, 5 Cow. 441, § 180.
Monroe *v.* Conner, 15 Me. 178, § 525.
v. Eastman, 31 Mich. 283, § 64.
Monroe County Com'rs *v.* May, 67 Ind. 562, § 1411.
Montefiore *v.* Brown, 7 H. L. Cas. 241, §§ 11, 208, 230.
Montelius *v.* Charles, 76 Ill. 303, § 816.
Montgomery *v.* Birge, 31 Ark. 491, § 346.
v. Byers, 21 Cal. 107, § 374.
v. Deeley, 3 Wis. 709, § 1406.
Montgomery County Bank *v.* Marsh, 7 N. Y. 481, § 895.
Montgomery, etc. R. Co. *v.* Trebles, 44 Ala. 255, § 740.
Moody *v.* Mack, 43 Mo. 210, §§ 739, 1009.
v. Setton, 2 Ired. Eq. 382, § 431.
v. State, 48 Ala. 115, § 1404.

Mooney *v.* Kennett, 19 Mo. 551, § 1409.
Moore *v.* Bennett, 2 Ch. Cas. 246, §§ 15, 313.
v. Coats, 43 Miss. 225, § 1375.
v. Gammel, 13 Tex. 120, § 1251.
v. Ryder, 65 N. Y. 440, § 94*b*.
Moore, The John T., 4 Am. L. T. 406, § 231.
More *v.* Massini, 32 Cal. 590, § 428.
Moreau *v.* Branham, 27 Mo. 351, § 211.
v. Detchemendy, 18 Mo. 522, §§ 119, 211.
Morecock *v.* Dickens, Amb. 678, § 104.
Morehead *v.* Gilmore, 77 Pa. St. 118, § 80.
Moreland *v.* Le Master, 4 Blackf. 383, §§ 44, 48.
v. Richardson, 22 Beav. 596; 24 Beav. 33, §§ 282, 303.
Morgan *v.* Bank of Louisville, 4 Bush, 82, § 988.
v. Dibble, 29 Tex. 107, § 570.
v. Jones, 24 Ga. 155, § 1272.
v. State, 12 Ind. 448, § 1414.
v. Stell, 5 Binn. 305, § 671.
v. Woods, 33 Ind. 23, § 1318.
Morland *v.* Cook, L. R. 6 Eq. 252, § 65*a*.
Morrill *v.* Moulton, 40 Vt. 242, §§ 2, 72, 1238.
Morris *v.* Bailey, 15 La. An. 2, § 1140.
v. Hauser, 2 Mood. & R. 392, § 1282.
v. Hogle, 37 Ill. 150, §§ 307, 1075.
v. Martin, 1 Str. 647, § 671.
v. Rexford, 18 N. Y. 552, § 72.
v. Shryock, 50 Miss. 590, §§ 465, 474.
v. Wadsworth, 17 Wend. 103, § 208.
Morris & Essex R. Co. *v.* Ayers, 29 N. J. L. 393, §§ 568, 570.
Morrison *v.* Kelley, 22 Ill. 610, § 307.
v. March, 4 Minn. 422, § 278.
v. McCartney, 30 Me. 183, § 1099.
Morrow *v.* Commonwealth, 48 Pa. St. 305, § 1281.
v. Weed, 4 Ia. 77, §§ 1160, 1161, 1370.
Morrow's Assignees *v.* Bright, 20 Mo. 298, § 431.
Morse *v.* Hewett, 28 Mich. 481, § 1405.
Morton *v.* Robards, 4 Dana, 258, §§ 232, 266, 273.
v. Westcott, 8 Cush. 425, §§ 888, 902.
Moseley *v.* Mastin, 37 Ala. 216, § 1417.
Moses *v.* Bost. & Me. R. Co. 24 N. H. 71; 32 N. H. 523, §§ 532, 533, 569, 577.
v. Ela, 43 N. H. 557, § 946.
Moshier *v.* Reding, 12 Me. 478, §§ 581, 583.
Mosley *v.* Hatch, 108 Mass. 517, § 677.
v. Vermont, etc. Ins. Co. 55 Vt. 142, § 1416.
Moss *v.* Atkinson, 44 Cal. 3, §§ 65*a*, 273, 279.
Mossman *v.* Forrest, 27 Ind. 233, § 1410.
Mott *v.* Clark, 9 Pa. St. 399, §§ 119, 262.
v. Lansing, 5 Lans. 516, § 1214.
Mottram *v.* Heyer, 5 Den. 629, §§ 459, 469.
Moulton *v.* de ma Carty, 6 Rob. (N. Y.) 470, § 1319.
v. Mason, 21 Mich. 364, § 1275.
Mountford *v.* Scott, T. & R. 274, § 689.
Mount Pleasant Bank *v.* McLeran, 26 Ia. 306, §§ 697, 712.
Mount Vernon Bank *v.* Holden, 2 R. I. 467, § 821.
Mowatt *v.* Howland, 3 Day, 353, § 513.
Mower *v.* Leicester, 9 Mass. 247, § 480*g*.
Moynahan *v.* Hanford, 42 Mich. 330, § 87.
Mueller *v.* Bates, 2 Disney (Ohio), 318, § 1378.
v. Engeln, 12 Bush, 441, §§ 77, 307, 322, 336.
Muir *v.* Jolly, 26 Beav. 143, §§ 297, 299.
v. Schenck, 3 Hill, 228, § 436.
Mulford *v.* Griffin, 1 Fost. & F. 145, § 486.
Mullen *v.* Higgins, 13 Abb. Pr. (N. S.) 297, § 1161.
Muller *v.* Hoyt, 14 Tex. 49, § 1259.
Mulligan *v.* Railroad, 36 Ia. 181, § 554.
Mulliken *v.* Graham, 72 Pa. St. 484, §§ 7, 28, 36.
Mullins *v.* Sparks, 43 Miss. 129, § 1345.
v. Wimberly, 50 Tex. 457, §§ 65*a*, 273, 279.

Mullison's Estate, 68 Pa. St. 212, § 65*a*.
Mulvey *v.* Carpenter, 78 Ill. 580, § 1205.
Mumma *v.* McKee, 10 Ia. 107, § 1227.
Munday *v.* Vawter, 3 Gratt. 518, § 176.
Mundorf *v.* Wickersham, 63 Pa. St. 87: 3 Am. Rep. 531, § 671*a*.
Munn *v.* Baker, 2 Stark. 255, §§ 539, 550.
v. Baldwin, 6 Mass. 316, § 882.
v. Best, 62 Mo. 491, § 316.
v. Burch, 25 Ill. 35, § 1417.
v. Commission Co. 15 Johns. 44, § 663.
Munroe *v.* Eastman, 31 Mich. 283, § 10.
Munson *v.* Town of Derby, 37 Conn. 298; 9 Am. Rep. 332, § 480*g*.
Murchison *v.* McLeod, 2 Jones (N. C.) L. 239, § 1260.
Murdock *v.* Finney, 21 Mo. 138, § 436.
Murphy *v.* Hendricks, 57 Ind. 593, § 176.
v. Keyes, 39 N. Y. Sup. Ct. 18, § 94*a*.
Murray *v.* Armstrong, 11 Mo. 209, § 586.
v. Ballou, 1 Johns. Ch. 566, § 341.
v. Barney, 34 Barb. 336, § 1417.
v. Blatchford, 1 Wend. 583, § 366.
v. Finster, 2 Johns. Ch. 155, § 341.
v. King, 5 B. & Ald. 165, § 1397.
v. Lardner, 2 Wall. 110, § 80.
v. Lylburn, 2 Johns. Ch. 441, § 431.
v. Mumford, 6 Cow. 441, § 496.
Murrell *v.* Watson, 1 Tenn. Ch. 342, § 307.
Musgrove *v.* Bonser, 5 Oreg. 313, §§ 4, 7, 12, 126, 246, 250, 673*a*.
Musick *v.* Barney, 49 Mo. 458, §§ 12, 133.
Mussey *v.* Raynor, 22 Pick. 223, §§ 388, 397.
Mussina *v.* Moore, 13 Tex. 7, § 1082.
Mut. Life Ins. Co. *v.* Dake, 1 Abb. (N. Cas.) 381, § 165.
Myers *v.* Davis, 22 N. Y. 489, § 431.
v. Overton, 4 E. D. Smith (N. Y.), 428, § 1160.
v. Ross, 3 Head (Tenn.), 59, §§ 676, 694.
Mysoner *v.* French, 73 N. C. 609, § 143*a*.

N.

Nalle *v.* Fenwick, 4 Rand. 585, § 1101.
Naron *v.* Gwin, 43 Miss. 346, § 1375.
Nash *v.* Gilkeson, 5 S. & R. 352, § 1321.
v. Harrington, 1 Aik. 49; 2 Aik. 9, §§ 972, 991.
Nashville Bank *v.* Bennett, 1 Yerg. 166, §§ 884, 885.
Nashville R. Co. *v.* Elliott, 1 Cold. (Tenn.) 611, § 674.
Nathan *v.* Sloan, 34 Ark. 524, § 87.
National Bank *v.* Burkhardt, 100 U. S. 686, § 480*n*.
v. Marr, 6 Bush (Ky.), 614, § 986.
v. Norton, 1 Hill, 572, § 683.
National Exch. Co. *v.* Drew, 33 Eng. L. & Eq. 1, § 654.
National Ins. Co. *v.* Chamber of Com. 69 Ill. 22, § 1381.
National Pemberton Bank *v.* Longee, 108 Mass. 371, § 87.
National Security Bank *v.* Cushman, 121 Mass. 490, §§ 682, 683*a*.
Neal *v.* Railroad, 8 Jones L. 482, § 566.
v. Taylor, 9 Bush, 380, §§ 794, 846.
v. Wood, 23 Ind. 523, § 933.
Neale *v.* Hagthrop, 3 Bland, 551, §§ 15, 310, 313.
Nealley *v.* Greenough, 25 N. H. 325, § 1262.
Neardhouser *v.* State, 28 Ind. 257, § 1410.
Neese *v.* Farmers' Ins. Co. 55 Ia. 604, § 1405.
Neesome *v.* Clarkson, 2 Hare, 163, § 690.
Nelson *v.* Allen, 1 Yerg. (Tenn.) 360, § 327.
v. Bridgeport, 8 Beav. 527, § 1405.
v. Hagerstown Bank, 27 Md. 51, § 96.
v. Pierce, 6 N. H. 194, § 1119.
v. Sims, 1 Cush. (Miss.) 383, §§ 17, 30.
v. Wade, 21 Ia. 49, §§ 176, 286.
Neltharpe *v.* Holgate, 1 Coll. 203, § 303.
Nesbit, *In re*, 2 D. & L. 529, § 1404.
Nevan *v.* Roup, 8 Ia. 207, § 1253.
Nevins *v.* Bank, 10 Mich. 547, §§ 821, 829, 846.

New England Car Spring Co. *v.* Union Rubber Co. 4 Blatchf. 1, § 1309.
New Haven Co Bank *v.* Mitchell, 15 Conn. 206, § 401.
New Hope Bridge Co. *v.* Phœnix Bank, 3 N. Y. 156, § 683.
New Jersey St. Nav. Co. *v.* Merchants' Bank, 6 How. 344, §§ 553, 559.
New Orleans *v.* Labott, 33 La. An. 107, § 1409.
New Orleans, etc. Canal Co. *v.* Templeton, 20 La. An. 141, § 1404.
New Orleans Savings Bank *v.* Harper, 12 Rob. (La.) 231, § 997.
New York Cent. Ins. Co. *v.* Kelsey, 13 How. Pr. 535, § 1178.
v. National Prot. Ins. Co. 20 Barb. 468, § 688.
New York, etc. Co. *v.* Schuyler, 34 N. Y. 30, § 683*a*.
New York Life Ins. Co. *v.* Cutler, 3 Sandf. Ch. 176, §§ 294, 299.
v. Smith. 2 Barb. Ch. 82, § 431.
Newborn *v.* Just, 2 Carr. & P. 76, § 558.
Newcomet *v.* Brotzman, 69 Pa. St. 185, § 521.
Newhall *v.* Cent. Pac. R. Co. 51 Cal. 345, § 472.
v. Pierce, 5 Pick. 450, §§ 297, 299, 305.
v. Vargas. 13 Me. 93, §§ 457, 464, 477.
Newlin *v.* Newlin, 8 S. & R. 41, § 1321.
Newman *v.* Chapman, 2 Rand. 93, §§ 338. 357.
v. Cincinnati, 18 Ohio, 331, § 1055.
Newmarch *v.* Clay, 14 East, 239, §§ 486, 490, 492.
Newsom *v.* Clarkson, 2 Ha. 163, § 308.
Newsome *v.* Coles, 2 Camp. 617, §§ 483. 487, 513.
v. Collins, 43 Ala. 656, §§ 307, 828.
Newstead *v.* Searles, 1 Atk. 265, § 672.
Newton *v.* McLean, 41 Barb. 285, § 96.
v. State Bank, 14 Ark. 9, § 1094.
Newton's Heirs *v.* State Bank, 22 Ark. 19, § 1094.
Nice's Appeal, 54 Pa. St. 200, § 96.
Nichols *v.* Boston, 98 Mass. 39, § 1313.
Nicholson *v.* Gouthit, 2 H. Bl. 609, §§ 952, 991.
v. Marders, 3 Rob. (La.) 242, § 897.
Niles *v.* Martin. 4 Mich. 557, § 480*g*.
Nixon *v.* Hamilton, 2 Dr. & Wall. 364. § 689.
v. Palmer, 8 N. Y. 398, §§ 663, 667.
Noble *v.* Thompson Oil Co. 79 Pa. St. 354, § 432.
Noel *v.* McCoory, 7 Coldw. 623, § 602.
Norcross *v.* Widgery, 2 Mass. 505, §§ 244, 278.
Normanville *v.* Pope, 2 Cro. 137, § 1390.
Norris *v.* Despard, 38 Md. 491. § 87.
v. Le Neve, 3 Atk. 26, § 688.
North *v.* Turner, 9 S. & R. 244, § 428.
North Bank *v.* Abbott, 13 Pick. 465, § 1397.
North River Bank *v.* Aymar, 3 Hill (N. Y.). 262, §§ 660, 681, 683, 683*a*.
North Whitehall, *In re*, 47 Pa. St. 156, § 1132.
Northern *v.* Williams, 6 La. An. 578, § 563.
Northrup *v.* Shephard, 23 Wis. 513. § 1371.
v. Syracuse, B. & N. Y. R. Co. 3 Abb. App. Dec. 386, § 576.
Northrup's Lessee *v.* Brehmer, 3 Ohio, 392, § 225.
Northy *v.* Field, 2 Esp. 613, § 469.
Norton *v.* Birge, 35 Conn. 250. § 347.
v. Eastman, 4 Me. 521, §§ 385, 391.
v. Foster, 12 Kan. 44. § 431.
v. Heywood, 20 Me. 359. § 1272.
v. Lewis, 2 Conn. 478. § 1397.
v. Pickering, 8 B. & C. 610, § 1004.
v. Rose, 2 Wash. (Va.) 233. § 436.
Norvell *v.* Hudgins, 4 Munf. 495, § 92*a*.
Norway *v.* Rowe, 19 Ves. 144, § 65*a*.
Norway Plains Co. *v.* Boston & M. R. Co. 1 Gray, 263, §§ 564, 566.
Noyes *v.* Hall, 97 U. S. 34. §§ 65*a*, 244, 246, 273, 276, 288.
v. Harr, 13 Ia. 570. § 167.
Nugent *v.* Opdike, 9 Rob. (La.) 453, § 434.
Nute *v.* Nute, 41 N. H. 60, § 17.

O.

O'Brien *v.* Norris, 16 Md. 122, § 457.
O'Conner *v.* Koch, 56 Mo. 259, § 1414.
O'Neil *v.* Garrett, 6 Ia. 480, § 463.
O'Neill *v.* N. Y. & Hud. R. R. Co. 60 N. Y. 138, § 532.
O'Reilly *v.* Nicholson, 45 Mo. 160, § 339.
O'Rourke *v.* O'Connor, 39 Cal. 442, §§ 65*a*, 279, 286.
Oakes *v.* Munroe, 8 Cush. 282, § 631.
Oats *v.* Walls, 28 Ark. 244, § 153.
Occum Co. *v.* Sprague Co. 34 Conn. 529, § 480*h*.
Odd Fell. S. Bank *v.* Banton, 46 Cal. 604, § 96.
Oelricks *v.* Ford, 23 How. 49, § 480*n*.
Ogden *v.* Cowley, 2 Johns. 274, § 1397.
v. Dobbin, 2 Hall, 112, § 717.
v. Haven, 24 Ill. 57, § 264.
v. Walters, 12 Kan. 282, § 1048.
Oglesby *v.* Steamboat, 10 La. An. 117, § 956.
Ohio, etc. Co. *v.* Ledyard, 8 Ala. 866, § 96.
v. Selby, 47 Ind. 471, § 558.
Olcott *v.* Robinson, 21 N. Y. 150, § 1101.
Olendorf *v.* Swartz, 5 Cal. 480, § 964.
Oliver *v.* Bank of Tenn. 11 Humph. 74, §§ 1004, 1005.
v. Harvey, 5 Oreg. 360, § 1220.
v. Piatt, 3 How. 333, §§ 11, 15, 308, 312.
Oppenheimer *v.* U. S. Ex. Co. 69 Ill. 62, § 554.
Orange County Bank *v.* Brown, 9 Wend. 85. § 542.
Orear *v.* McDonald, 9 Gill, 350, § 1011.
Oriental Bank *v.* Blake, 22 Pick. 206, § 763.
Ormsby *v.* Town of Granby, 48 Vt. 44, § 1222.
Orndorf *v.* Adams Ex. Co. 3 Bush, 194, §§ 553, 558.
Orr *v.* McGinness, 7 East, 359, § 1009.
Orrick *v.* Colston, 7 Gratt. 189, § 87.
Orr Water Ditch Co. *v.* Reno W. Co. 5 W. Coast Rep. 666, § 683*b*.
Orvis *v.* Newell, 17 Conn. 97, §§ 191, 208.
Osborn *v.* Cloud, 21 Ia. 238, § 1188.
Osborne *v.* Moncure, 3 Wend. 170, § 780.
Ostrander *v.* Brown, 15 Johns. 39, §§ 574, 576.
Oswald *v.* Grew, 29 Eng. L. & Eq. 85. § 1138.
Oswego Bank *v.* Knower, Hill & Den. 122, § 946.
Otis *v.* Dargan, 53 Ala. 178, § 1084.
Ottumwa *v.* Parks, 43 Ia. 119, § 480*m*.
Ouimet *v.* Henshaw, 35 Vt. 604, § 570.
Overman *v.* Hoboken City Bank, 30 N. J. L. 61, § 480*o*.
Owen *v.* Homan, 4 H. L. 997, §§ 10, 11.
Owens *v.* Kinsey, 6 Jones' L. (N. C.) 38, § 1224.
v. Miller, 29 Md. 144, § 225.
v. Roberts, 36 Wis. 258, §§ 672, 690.
Owings *v.* Hull, 9 Pet. 607, § 1404.
Oxford Bank *v.* Haynes, 8 Pick. 423, § 413.
Oxford Rate, 8 El. & Bl. 184, § 1407.
Oxwith *v.* Plummer, 2 Vern. 636, §§ 65*a*, 281, 294, 303.

P.

Packard *v.* Getman, 6 Cow. 757, § 453.
v. Johnson, 51 Cal. 545, § 96.
Packwood *v.* Gridley, 39 Ill. 388, § 88.
Page *v.* Thompson, 43 N. H. 373, § 434.
v. Waring, 76 N. Y. 463, §§ 96, 206, 357, 375.
Pagett *v.* Curtis, 15 La. An. 451, § 1136.
Paine *v.* Mooreland, 15 Ohio, 435, §§ 1057, 1160.
Palfrey *v.* Portland, etc. R. Co. 4 Allen, 55, § 1405.
Palgrave *v.* Windham, 1 Str. 212, § 1387.
Pallen *v.* Hollidaysburg, 40 Pa. St. 206, § 44.
Palmer *v.* Bates, 22 Minn. 532, § 297.
v. Wheeler, 2 Ba. & B. 18, §§ 15, 313.
Palomeres, Estate of, 63 Cal. 402, § 1136.
Papin *v.* Buckingham, 33 Mo. 454, § 1191.
v. Ryan, 32 Mo. 21, § 1404.

Parent *v.* Walmsley, 20 Ind. 82, § 1404.
Parish *v.* Brooks, 4 Brews. 154, §§ 30, 65.
Park *v.* Bates, 12 Vt. 387, § 280*c*.
Parke *v.* Chadwick, 8 W. & S. 96, §§ 10, 19.
Parker *v.* Fay, 43 Miss. 260, § 29.
v. Hill, 8 Metc. 447, §§ 119, 141, 142, 143.
v. Kane, 4 Wis. 1, §§ 10, 16.
v. Meader, 32 Vt. 300, § 1300.
v. Middlebrook, 24 Conn. 207, § 67.
v. Osgood, 3 Allen, 487, § 14.
v. Sedwick, 5 Md. 281, § 1300.
v. Whyte, 1 H. & M. 167, § 286.
Parkin *v.* Carruthers, 3 Esp. 246, §§ 483, 517.
Parkist *v.* Alexander, 1 Johns. Ch. 394, §§ 112, 113.
Parks *v.* Jackson, 11 Wend. 442, §§ 363, 368.
Parman *v.* Brewster, 15 Gray, 271, § 423.
Parmlee *v.* Catherwood, 36 Mo. 479, § 76.
Parret *v.* Shaubhut, 5 Minn. 323, §§ 119, 137.
Parry *v.* May, 1 Mood. & Rob. 279, § 1273.
v. Woodson, 33 Mo. 347, § 1318.
Parsons *v.* Hoyt, 24 Ia. 154, §§ 360, 368.
v. Loyd, 3 Wilson, K. B. 341, § 1159.
v. Monteath, 13 Barb. 353, § 553.
Partridge *v.* Davis, 20 Vt. 499, §§ 420, 422.
v. Smith, 2 Biss. 183, §§ 12, 161, 183.
Pate *v.* McClure, 4 Rand. 164, § 956.
Path *v.* Anstatt, 4 W. & S. 307, § 96.
Patience *v.* Townley, 2 J. P. Smith, 223, § 982.
Patrick *v.* Davis, 15 Ark. 363, § 1109.
v. Morse, 64 Cal. 462, § 1201.
Patten *v.* Moore, 32 N. H. 382, §§ 113, 288, 290.
Patterson *v.* Donner, 48 Cal. 369, § 96.
v. Franklin Ins. Co. 22 Pittsb. L. J. 201, § 488*n*.
v. Hubbard, 30 Ill. 201, § 1226.
v. McCausland, 3 Bland, 69, § 1415.
Patterson *v.* Wynn, 5 Wheat. 232, § 1413.
Patton *v.* Caldwell, 1 Dall. 419, § 480*l*.
v. Gleason, 106 Mass. 439, § 94*a*.
v. Ins. Co. 40 N. H. 375, §§ 687, 689.
Paul *v.* Christie, 4 Harr. & McH. 161, § 748.
v. Connersville, etc. R. Co. 51 Ind. 527, §§ 16, 25.
v. Witman, 3 W. & S. 409, §§ 480*c*, 480*d*.
Payne *v.* Cave, 3 T. R. 148, § 381.
v. Flournoy, 29 Ark. 500, § 87.
v. Patrick, 21 Tex. 680, § 714.
Payne *v.* Treadwell, 16 Cal. 220, §§ 1404, 1405.
Paytona, The, 2 Curtis, 21, § 573.
Peabody *v.* Fenton, 3 Barb. Ch. 451, § 24.
v. Hamilton, 106 Mass. 217, § 1357.
v. Phelps, 9 Cal. 213, § 1146.
Peacock *v.* Purcel, 14 C. B. (N. S.) 728, § 721.
v. Rhodes, 2 Doug. 611, § 80.
Peak *v.* North Staffordshire R. Co. 10 H. L. Cas. 478, § 560.
Pearce *v.* Hooper, 3 Taunt. 60, § 1278.
v. Longfit, 101 Pa. St. 507, § 1410.
Pearson *v.* Bradley, 48 Ill. 250, § 1102.
v. Crallan, 2 Smith, 404, § 823.
v. Daniel, 2 Dev. & Bat. 366, § 7.
v. Darrington, 32 Ala. 227, § 1417.
v. Lovejoy, 53 Barb. 407, § 1198.
v. Morgan, 2 Bro. Ch. 353, §§ 7, 35.
Peay *v.* Capps, 27 Ark. 160, § 316.
Peck *v.* Mallams, 10 N. Y. 509, §§ 149, 158.
Peckham *v.* Gilman, 7 Minn. 449, § 87.
Peebles *v.* Reading, 8 S. & R. 484, § 29.
Peet *v.* Zanders, 6 La. An. 364, § 990.
Pell *v.* McElroy, 36 Cal. 268, §§ 65*a*, 273, 280, 299.
Pelton *v.* Renssalaer, etc. R. Co. 54 N. Y. 214, § 576.
Pendleton *v.* Commonwealth, 4 Leigh, 694, § 1263.

Pendleton *v.* Fay, 2 Paige, 202, §§ 10, 22.
Pennell *v.* Monroe, 30 Ark. 661, § 1115.
Pennoyer *v.* Neff, 95 U. S. 714, § 1057.
Pennsylvania Co. *v.* Frana, 13 Ill. App. 91, § 1410.
Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315, § 558.
v. McClosky, 23 Pa. St. 526, § 558.
Penny *v.* Crane Bros. M. Co. 80 Ill. 244, § 394.
v. Watts, 1 Macn. & G. 150, §§ 30, 56.
Penobscot R. Co. *v.* Weeks, 52 Me. 456, § 1138.
People *v.* Bacon, 18 Mich. 247, § 1143.
v. Bernard, 43 Cal. 385, § 1351.
v. Buchanan, 1 Idaho (N. S.), 681, § 1409.
v. Burton, 65 N. Y. 452, § 1358.
v. Callahan, 60 How. Pr. 372; 23 Hun, 581, § 1410.
v. Centre, 6 W. Coast Rep. 150; 61 Cal. 191, §§ 1202, 1209, 1216.
v. Chee Kee, 61 Cal. 404, § 1415.
v. De La Guerra, 24 Cal. 73, § 1414.
v. Fennell (Utah), 6 West Coast Rep. 837, § 1210.
v. Grigsby, 62 Cal. 482, § 1220.
v. Herman, 45 Cal. 689, § 1145.
v. Highway Com'rs, 14 Mich. 528, § 1119.
v. Holbrook, 13 Johns. 90, § 1262.
v. Huber, 20 Cal. 81, § 1031.
v. John, 22 Mich. 461, § 1413.
v. Lyman, 2 Utah, 30, § 1412.
v. Mahaney, 13 Mich. 481, § 1404.
v. Robinson, 17 Cal. 363, § 1411.
v. Tallman, 36 Barb. 222, § 1139.
v. Whyler, 41 Cal. 351, § 1123.
People's Bank *v.* Keech, 26 Md. 521, §§ 751, 759.
Pepper *v.* George, 51 Ala. 190, § 689.
Pepper's Appeal, 77 Pa. St. 373, § 117.
Perkins *v.* Barstow, 9 R. I. 507, § 87.
v. Bradley, 1 Hare, 219, § 689.
v. Jordon, 35 Me. 23, § 480*n*.
v. Swank, 43 Miss. 349, § 273.
Perkins *v.* Wash. Ins. Co. 4 Cow. 645, § 653.
Perrin *v.* Reed, 35 Vt. 2, § 192.
Perrine *v.* Miller, 4 Thomp. & C. 36, § 1314.
Perry *v.* Fitzhowe, 8 Q. B. 757, § 480*h*.
v. Green, 19 N. J. L. 61, § 943.
v. Holl, 2 De G. F. & J. 38, §§ 10, 34, 56, 674.
v. John, 79 Pa. St. 411, § 480*g*.
v. Siter, 37 Mo. 273, § 1221.
v. Thompson, 98 Mo. 249, § 553.
Peru *v.* French, 55 Ill. 317, § 480*g*.
Peterhoff, The, Blatch. Prize Cas. 463, §§ 1410, 1417.
Peters *v.* Goodrich, 3 Conn. 146, §§ 10, 208.
v. Hobbs, 25 Ark. 67, §§ 928, 985.
v. Newkirk, 6 Cow. 103, § 1138.
v. St. Louis, etc. R. Co. 59 Mo. 406, § 1161.
Peterson, *Ex parte*, 33 Ala. 74, § 1412.
Peto *v.* Hammond, 30 Beav. 495, § 46.
Petree *v.* Bell, 2 Bush, 58, § 357.
Petrie *v.* Nuttall, 11 Exch. 569, § 480*f*.
Pettibone *v.* Griswold, 4 Conn. 158, §§ 47, 149, 179.
Peychard *v.* Citizens' Bank, 21 La. An. 262, § 97.
Phelan *v.* Moss, 67 Pa. St. 59, § 80.
Phelps *v.* Hunt, 40 Conn. 97, § 1234.
Philadelphia, etc. R. Co. *v.* Lehman, 56 Md. 209, § 1415.
Philipe *v.* Harberlee, 45 Ala. 597, § 913.
Philips *v.* Reitz, 16 Kan. 396, § 10.
Phillips *v.* Alderson, 5 Humph. 403, § 862.
v. Bank of Lewiston, 18 Pa. St. 394, §§ 25, 117.
v. Bowen, 2 Pa. St. 20, § 1230.
v. Costley, 40 Ala. 486, §§ 65*a*, 273.
Philliskirk *v.* Pluckwell, 2 M. & S. 393, § 728.
Phipson *v.* Kneller, 1 Stark. 116, § 939.
Phœnix Ins. Co. *v.* Church, 59 How. Pr. 293, § 1405.
Pickard *v.* Perley, 45 N. H. 188, §§ 616, 619.
v. Polhimus, 3 Mich. 185, § 1247.
Pickering *v.* Busk, 15 East, 38, §§ 70, 652, 653.

Pickering *v.* Ilfracome R'y, L. R. 3 C. P. 235, § 434.
Pier *v.* Carr, 69 Pa. St. 326, § 644.
v. Heinrichoffen, 52 Mo. 333, § 1397.
Pierce *v.* Indseth, 106 U. S. 546, § 1413.
v. Pendar, 5 Metc. 352, §§ 844, 846, 854.
v. Richardson, 37 N. H. 306, § 1109.
v. Taylor, 23 Me. 246, § 207.
v. Whitney, 29 Me. 188, § 480*n*.
Pigott *v.* Snell, 59 Ill. 106, §§ 1349, 1372.
Pike *v.* Armstead, 1 Dev. Eq. 110, § 253.
v. Galvin, 29 Me. 183, §§ 214, 216.
v. Goodnow, 12 Conn. 472, § 310.
Pilcher *v.* Rawlins, L. R. 11 Eq. 53; 7 Ch. 259, § 307.
Pillow *v.* Hardeman, 3 Humph. (Tenn.) 538, § 926.
Pilmer *v.* Branch of State Bank, 16 Ia. 312, § 1227.
Pindall *v.* Trevor, 30 Ark. 249, § 377.
Pindell *v.* Maydwell, 7 B. Mon. 314, § 348.
Pinkerton *v.* Manchester, etc. R. Co. 42 N. H. 424, § 440.
Pitcher *v.* Barrows, 17 Pick. 361, §§ 119, 515.
v. Livingston, 4 Johns. 1, § 480*c*.
v. Rawlins, L. R. 11 Eq. 53, § 65*a*.
Pitkin *v.* Leavitt, 13 Vt. 379, §§ 480*c*, 480*m*.
Pitman *v.* Gaty, 10 Ill. 186, § 284.
v. Sofley, 64 Ill. 155, § 29.
Pitney *v.* Leonard, 1 Paige, 461, § 8.
Pitre *v.* Offut, 21 La. An. 679, § 480*n*.
Pitts *v.* Mower, 18 Me. 361, § 434.
Pittsburgh, etc. R. Co. *v.* Elliott, 38 Ind. 153, § 1219.
Platt *v.* Robinson, 10 Wis. 128, § 1196.
Pleasant *v.* Benson, 14 East, 234, § 624.
Ploughboy, The, 1 Gall. 41, § 67.
Plumb *v.* Fluitt, 2 Anstr. 432, §§ 8, 37.
Plumer *v.* Robertson, 6 S. & R. 179, § 297.
Polk *v.* Spinks, 5 Coldw. 431, § 983.
Pollard *v.* Somerset Mut. Fire Ins. Co. 42 Me. 221, § 432.
v. Wegener, 13 Wis. 569, §§ 1160, 1345, 1371, 1372.
Pomeroy *v.* Betts, 31 Mo. 419, §§ 1031, 1054, 1059, 1060, 1084, 1136.
v. N. Y. & N. H. R. Co. 4 Blatch. 120, § 1306.
Pomroy *v.* Stevens, 11 Met. 244, §§ 14, 96, 244, 274.
Ponder *v.* Scott, 44 Ala. 241, § 34.
Pons *v.* Kelley, 2 Hayw. 45, § 991.
Pope *v.* Garland, 4 Y. & C. Ex. 394, §§ 65*a*, 321.
v. Headen, 5 Ala. 433, § 1108.
Porter *v.* Bank of Rutland, 19 Vt. 410, §§ 673*a*, 683*b*, 689.
v. Chicago & R. I. R. Co. 20 Ill. 407, § 566.
v. Cole, 4 Me. 20, §§ 246, 251.
v. Kimball, 53 Barb. 467, § 935.
v. Pillsbury, 36 Me. 278, § 1235.
v. Rayworth, 13 East, 417, § 975.
v. Sevy, 43 Me. 519, § 245.
Porthouse *v.* Parker, 1 Camp. 82, § 751.
Portis *v.* Hill, 3 Tex. 278, § 280.
Portwood *v.* Wilburn, 33 Tex. 713, § 1152.
Potier *v.* Barclay, 15 Ala. 439, § 1257.
Potter *v.* Sanders, 6 Hare, 1, §§ 55, 383.
Potts *v.* Bell, 8 T. R. 548, § 980.
Powell *v.* Dillon, 2 Ba. & B. 416, §§ 281, 282, 303.
v. Myers, 26 Wend. 591, § 552.
v. Penn. R. Co. 32 Pa. St. 414, § 558.
v. Waters, 17 Johns. 176, §§ 94*a*, 94*b*.
Power *v.* Kane, 5 Wis. 265, § 480*n*.
Powers *v.* McFerran, 2 S. & R. 44, § 217.
Powles *v.* Page, 3 M. G. & S. 16, § 683*a*.
Prather *v.* Pritchard, 26 Ind. 65, § 1246.
Pratt *v.* Hoag, 5 Duer, 631, § 341.
v. Page, 32 Vt. 13, §§ 489, 519.
v. Richards, 69 Pa. St. 53, § 643.
v. Tinkom, 21 Minn. 142, §§ 1103, 1133.
Prell *v.* McDonald, 7 Kan. 426, § 1404.
Prentiss *v.* Danielson, 5 Conn. 175, §§ 943, 963.

Prentiss *v.* Garland, 64 Me. 155, §§ 420, 422.
v. Sinclair, 5 Vt. 149, §§ 485, 515.
Prescott *v.* Heard, 10 Mass. 60, § 278.
v. Hull, 17 Johns. 284, § 434.
v. Nevens, 4 Mason, 330, § 280.
President, etc. of Connersville *v.* Woodleigh, 7 Blackf. 102, § 1254.
Presley *v.* Anderson, 42 Miss. 274, § 1375.
Preston *v.* Tubbin, 1 Vern. 286, § 344.
Price *v.* Jones, 3 Head, 84, § 72.
v. McDonald, 1 Md. 403, §§ 17, 36, 357.
v. Methodist Epis. Ch. 4 Ohio, 515, § 225.
v. Page, 24 Mo. 65, § 1410.
v. Powell, 3 N. Y. 332, §§ 571, 573.
v. Young, 1 McCord, 339, § 991.
Prickett *v.* Ritter, 16 Ill. 96, § 611.
Prideaux *v.* Collier, 2 Stark. 57, § 1014.
Priest *v.* Rice, 1 Pick. 164, § 235.
Priezer *v.* Exchange, etc. Ins. Co. 6 Wis. 89, § 1404.
Prindle *v.* Anderson, 19 Wend. 391, §§ 585, 648.
Pringle *v.* Dunn, 37 Wis. 449, §§ 11, 12, 124, 137, 149, 307, 674, 679, 680.
v. Phillips, 5 Sandf. 157, § 87.
Pritchett *v.* Sessions, 10 Rich. L. 293, §§ 687, 689.
Proctor *v.* Cooper, 2 Drew, 1; 1 Jur. (N. S.) 149, §§ 240, 375.
Pruitt *v.* Railroad, 62 Mo. 527, § 557.
Pugh *v.* State, 2 Head, 227, § 1414.
Pugsley *v.* Aiken, 11 N. Y. 494, § 582.
Pullman Pal. C. Co. *v.* Baker, 4 Colo. 344, § 480*a*.
Purchase *v.* Mattison, 6 Duer, 587, §§ 94*b*, 1009.
Pursell *v.* Long, 7 Jones L. (N. C.) 102, § 1225.
Pursley *v.* Hays, 22 Ia. 11, §§ 1160, 1341.
Pyer *v.* Carter, 1 H. & N. 916, § 65*a*.

Q.

Queen, The, *v.* Elworthy, 1 Cr. Cas. 103, § 1261.
Quiggin *v.* Duff, 1 M. & W. 174, § 574.
Quinn *v.* Hard, 43 Vt. 375, § 94*b*.
Quirk *v.* Thomas, 6 Mich. 76, § 207.

R.

Rackleff *v.* Norton, 19 Me. 274, § 96.
Rafferty *v.* Mallory, 3 Biss. 362, §§ 307, 323.
Raggsdale *v.* Hogg, 9 Gratt. 409, § 431.
Ragland *v.* Wynn, 37 Ala. 32, § 1412.
Railroad Co. *v.* Brown, 17 Wall. 445, § 1382.
v. Harris, 12 Wall. 65, § 1307.
v. Manuf. Co. 16 Wall. 318, § 532.
Railroad Tax Case, 8 Saw. 238, § 1139.
Railway Co. *v.* Whitton, 13 Wall. 284, § 1307.
Ralls *v.* Graham, 4 Mon. 120, § 219.
Ralston *v.* Bullitts, 3 Bibb, 361, § 1017.
Ramdulollday *v.* Darieux, 4 Wash. C. C. 61, § 1017.
Ramsey *v.* Strobach, 52 Ala. 513, § 651.
Rancliffe *v.* Parkyns, 6 Dow. 149, §§ 8, 13.
Rand *v.* Dodge, 17 N. H. 343, § 1231.
v. State, 77 N. C. 175, § 94*a*.
Randall *v.* Falkner, 41 Cal. 242, § 1161.
v. Silverthorne, 4 Pa. St. 173, §§ 10, 16, 300.
v. Smith, 34 Barb. 452, § 916.
Randolph *v.* N. J. West L. R. Co. 28 N. J. Eq. 49, § 97.
Rankin *v.* Childs, 9 Mo. 673, §§ 395, 399.
v. Dulaney, 43 Miss. 197, §§ 1374, 1375.
Ransom *v.* Loyless, 49 Ga. 471, § 499.
Ransome *v.* Mack, 2 Hill, 587, §§ 840, 841, 850, 904, 921.
Rape *v.* Heaton, 9 Wis. 328, §§ 1371, 1372, 1405.
Rapelye *v.* Bailey, 3 Conn. 428, §§ 389, 401.
v. Prince, 4 Hill, 119, § 480*l*.
Raritan Water Power Co. *v.* Veghte, 21 N. J. Eq. 463, §§ 10, 16, 30.
Ratcliffe *v.* Barnard, L. R. 6 Ch. 652, §§ 56, 65*a*.

Rathburn *v.* Acker, 18 Barb. 393, § 1334.
Rawson *v.* Holland, 47 How. Pr. 292, § 573.
Ray *v.* Birdseye, 5 Den. 626, § 273.
Ray *v.* Bush, 1 Root, 81, § 113.
v. Roe, 2 Blackf. 258, §§ 347, 351.
v. Smith, 17 Wall. 411, §§ 946, 948.
Raymond *v.* Squire, 11 Johns. 47, § 432.
Reab *v.* Moor, 19 Johns. 337, § 1285.
Read *v.* French, 28 N. Y. 285, § 1338.
v. St. Louis R. Co. 60 Mo. 199, § 538.
Reading *v.* Ford, 1 Bibb, 338, § 1161.
Real Estate Sav. Inst. *v.* Collonius, 63 Mo. 290, §§ 339, 342*a*, 344.
Reasoner *v.* Edmonson, 5 Ind. 393, § 101.
Rector *v.* St. Louis C. Ct. 1 Mo. 607, § 1211.
Redmon *v.* Steamboat Co. 46 N. Y. 583, § 564.
Redpath *v.* Roberts, 3 Esp. 225, § 644.
Reed *v.* Allison, 61 Cal. 461, § 1218.
v. Coale, 4 Ind. 283, § 119.
v. Gannon, 50 N. Y. 345, §§ 16, 65*a*, 299.
v. Hawley, 45 Ill. 40, § 636.
v. Kemp, 16 Ill. 445, §§ 127, 128.
v. Marbley, 10 Paige, 409, § 431.
v. Northfield, 13 Pick. 94, § 480*g*.
v. Ownby, 44 Mo. 204, § 96.
v. Trentman, 53 Ind. 438, § 94*b*.
v. Tyler, 56 Ill. 288, § 1376.
v. Wilson, 41 N. J. L. 29, § 1404.
Reeder *v.* Barr, 4 Ohio, 446, § 311.
v. Holcomb, 105 Mass. 93, § 1358.
Reed's Appeal, 34 Pa. St. 207, § 672.
Reese *v.* Beck, 24 Ala. 651, § 1248.
Reeves *v.* Ayers, 38 Ill. 418, § 273.
v. Kimball, 40 N. Y. 299, § 431.
Reg. *v.* St. Maurice, 16 Q. B. 908, § 1410.
v. Whittles, 13 Q. B. 248, § 1410.
Reggio *v.* Braggiotti, 7 Cush. 166, § 280*l*.
Regina *v.* Hankins, 2 Carr. & Kir. 822, § 1286.
Reichert *v.* McClure, 23 Ill. 516, § 234.
Reid *v.* Payne, 16 Johns. 218, §§ 883, 922.
Reigart *v.* White, 52 Pa. St. 438, § 421.
Reilley *v.* Smith, 16 La. An. 31, § 506.
Relfe *v.* Valentine, 45 Ala. 286, § 1154.
Remer *v.* Downer, 23 Wend. 620, §§ 842, 883.
Renfro *v.* Harrison, 10 Mo. 411, § 143*a*.
Renner *v.* Bank of Columbia, 9 Wheat. 582, § 480*o*.
Reno *v.* Hogan, 12 B. Mon. 63, § 558.
Renshaw *v.* Triplett, 23 Mo. 213, §§ 707, 717.
Requa *v.* City of Rochester, 45 N. Y. 129; 6 Am. Rep. 52, § 480*g*.
v. Collins, 51 N. Y. 144, § 922.
Rex *v.* Haworth, 4 Carr. & P. 254, § 1261.
v. Holland, 5 T. R. 607, § 1387.
v. Huggins, Ld. Raym. 1583, § 480*i*.
Rey *v.* Simpson, 22 How. 241, § 87.
Reynolds *v.* Appleman, 41 Md. 615, § 840.
v. B. & M. R. 43 N. H. 580, §§ 466, 480.
v. Harris, 14 Cal. 667, § 1096.
v. Kenyon, 43 Barb. 585, § 683*b*.
v. Kingsbury, 15 Ia. 238, §§ 112, 125.
v. Railroad, 43 N. H. 580, § 457.
v. Ruckman, 35 Mich. 80, §§ 10, 26, 29, 64.
v. Wilson, 15 Ill. 394, § 1088.
Rhett *v.* Poe, 2 How. 457, § 732.
Rhoades *v.* Delaney, 50 Ind. 468, § 1358.
v. Selin, 4 Wash. C. Ct. 715, § 1278.
Rhode *v.* Proctor, 4 B. & C. 517, §§ 771, 991.
Rhodes *v.* Cooke, 4 L. J. Ch. 147, § 29.
v. L. & N. R. Co. 9 Bush, 688, § 558.
Rhopho, etc. Township *v.* Moore, 68 Pa. St. 404, § 480*g*.
Rice *v.* Bost. & Worcester R. Corp. 98 Mass. 212, § 567.
v. K. P. R'y, 63 Mo. 314, § 480*b*.
v. Montgomery, 4 Biss. 75, § 1410.
v. Rice, 2 Drew, 73, §§ 50, 297, 299.

Rich *v.* Roberts, 48 Me. 548, § 194.
v. Starbuck, 45 Ind. 310, § 1220.
Richards *v.* Daily, 34 Ia. 427, § 431.
v. Griggs, 16 Mo. 416, §§ 434, 440.
v. Hicks, 1 Overton. 207, § 1405.
v. M. S. & N. etc. R. Co. 20 Ill. 404, § 566.
Richardson *v.* B. & M. R. Co. 8 Ia. 260, § 1235.
v. Goddard, 23 How. 44, § 480*n*.
v. White, 18 Cal. 102, § 374.
v. Wicker, 74 N. C. 278, § 228.
Richmond, The, 1 Biss. 49, § 575.
Rider *v.* Johnson, 20 Pa. St. 190, § 431.
Riddle *v.* Coburn, 8 Gray, 241, § 72.
v. Mandeville, 5 Cranch, 322, § 706.
Ridgeway *v.* Holliday, 59 Mo. 444, §§ 307, 316.
Ridgley *v.* Stillwell, 25 Mo. 570, § 613.
Riggs *v.* Boylan, 4 Biss. 445, § 153.
Right *v.* Beard, 13 East, 210, § 593.
v. Cuthell, 5 East, 491, §§ 616, 698, 700.
v. Darby, 1 T. R. 159, § 607.
Righter *v.* Forrester, 1 Bush, 278, §§ 232, 266.
Rigs *v.* Cage, 2 Humph. (Tenn.) 350, § 671.
Rigsbee *v.* Bowler, 17 Ind. 167, § 1159.
Riley *v.* Horne, 5 Bing. 217, §§ 542, 558.
v. Nichols, 1 Heisk. (Tenn.) 16, §§ 1036, 1037.
Ring *v.* Steele, 3 Keyes, 450, §§ 203, 231*a*.
Ringgold *v.* Bryan, 3 Md. Ch. D. 488, §§ 60, 273.
v. Waggoner, 14 Ark. 69, §§ 10, 25.
Ringold *v.* Patterson, 15 Ark. 209, § 1091.
Ripple *v.* Ripple, 1 Rawle, 386, § 28.
Rising *v.* Stannard, 17 Mass. 282, § 608.
Risley, Succession of, 11 Rob. (La.) 298, § 432.
Ritter *v.* Offutt, 40 Md. 207, § 1157.
Rivers *v.* Walker, 1 Dall. 85, § 1321.
Roach *v.* Barnes, 33 Mo. 319, § 1141.
v. Karr, 18 Kan. 529, § 674.
Robards *v.* Marley, 80 Ind. 185, § 1405.
Robb *v.* Mudge, 14 Gray, 534, § 499.
v. Starkey, 2 Carr. & Kir. 143, § 1270.
Roberts *v.* Anderson, 3 Johns. Ch. 371, § 8.
v. Bourne, 23 Me. 165, §§ 205, 206.
v. Croft, 2 De G. & J. 1, § 56.
v. Eden, 1 Bos. & P. 398, § 94*a*.
v. Mosley, 64 Mo. 507, §§ 16, 25, 673*a*.
v. Riley, 15 La. An. 103, § 553.
v. Stanton, 2 Munf. 129, § 27.
v. Taft, 120 Mass. 169, §§ 887, 902.
Robertson *v.* Williamson, 5 Munf. 331, § 94*b*.
Robins *v.* Gibson, 3 Camp. 334, § 1005.
Robinson, Estate of, 6 Mich. 137, § 1363.
Robinson *v.* Bartlett, 11 Minn. 410, § 87.
v. Chittenden, 14 N. Y. Sup. Ct. 133, § 563.
v. Int. Life As. Soc. 42 N. Y. 54, § 748.
v. Williams, 22 N. Y. 380, § 180.
v. Willoughby, 7 N. C. 358, § 231*a*.
Robison *v.* Goswold, 6 Mod. 171, § 671.
Robson *v.* Bennett, 2 Taunt. 388, § 817.
v. Flight, 4 De G. J. & S. 608, § 307.
Rochfort *v.* Robertson, 12 East, 427, § 1181.
Rockendorff *v.* Taylor's Lessee, 4 Pet. 349, §§ 1102, 1116.
Rockwell *v.* Bradley, 2 Conn. 1, § 600.
Roddy *v.* Williams, 3 Jones & L. 1, §§ 15, 313.
Rodgers *v.* Kavanaugh, 24 Ill. 583, § 176.
Rodick *v.* Gandell, 1 De G. M. & G. 763, § 430.
Roe *v.* Pierce, 2 Camp. 96, §§ 622, 698, 699, 700.
Rogers, *Ex parte*, 8 De G. M. & G. 27, § 437.
Rogers *v.* Burchard, 34 Tex. 441, §§ 205, 207.
v. Custance, 2 Mood. & R. 179, § 1282.
v. Hackett, 21 N. H. 100, § 967.
v. Hoskins, 14 Ga. 166, § 7.

Rogers *v.* Hussey, 36 Ia. 664, § 277.
v. Jones, 8 N. H. 264, §§ 15, 35, 273, 279, 288, 294, 313.
v. McElhone, 12 Abb. Pr. 392, § 1201.
v. Mutton, 7 Hurl. & N. 733, § 1393.
v. State, 50 Ala. 102, §§ 1414, 1415.
v. Stephens, 2 T. R. 713, § 1001.
v. West, 9 Ind. 400, § 532.
v. Wiley, 14 Ill. 65, § 35.
Rogerson *v.* Hare, W. W. & D. 65, § 718.
Rolland *v.* Hart, L. R. 6 Ch. 678, §§ 56, 672, 689, 690.
Rome R. R. *v.* Sullivan, 14 Ga. 277, §§ 571, 574.
Rood *v.* Chapin, Walk. Ch. 79, § 96.
Rorke, *In re*, 13 Ir. Ch. R. 273; 14 Ir. Ch. 442, § 690.
Rose *v.* Lewis, 10 Mich. 483, § 1263.
v. Railroad, 39 Ia. 246, § 558.
Rosher *v.* Kieran, 3 Camp. 87, § 710.
Ross *v.* Anstell, 2 Cal. 183, § 1411.
v. Bedell, 5 Duer, 462, § 997.
v. Boswell, 60 Ind. 235, § 1415.
v. Bruce, 1 Day, 100, § 1263.
v. Worthington, 11 Minn. 438.
Rosseau *v.* Gayarre, 24 La. An. 355, § 1346.
Rossiter *v.* Rossiter, 8 Wend. 494, § 657.
Rothschilds *v.* M. C. R. Co. 69 Ill. 164, § 566.
Rotschild *v.* Grix, 31 Mich. 150, § 87.
Rounds *v.* McChesney, 7 Cow. 360, § 97.
Routh *v.* Robertson, 11 Sm. & M. 382, § 840.
v. Spencer, 38 Ind. 393, § 97.
Rowan *v.* Adams, 1 Sm. & M. Ch. 45, § 27.
v. Lytle, 11 Wend. 616, § 596.
Rowe *v.* Tipper, 20 Eng. L. & Eq. 220, §§ 795, 797.
Rowell *v.* Klein, 44 Ind. 290, § 1378.
Rowley *v.* Bigelow, 12 Pick. 307, § 463.
v. Horne, 3 Bing. 2, § 546.
v. Howard, 23 Cal. 401, § 1362.
Rowls *v.* Deshler, 4 Abb. App. Dec. 12, § 472.
Rucker *v.* Donovan, 13 Kan. 251, § 475.
v. Hiller, 16 East, 43, § 1004.
Rudy *v.* Wolf, 16 S. & R. 79, § 421.
Rugely *v.* Davidson, 2 Mills' Const. R. 33, § 739.
Runkle *v.* Hagan, 3 Mo. 234, § 1211.
Runquist *v.* Ditchell, 3 Esp. 64, § 654.
Runyan *v.* McClellan, 24 Ind. 165, § 240.
Runyon *v.* Montfort, Busb. (N. C.) 371, § 906.
Rupert *v.* Mark, 15 Ill. 540, §§ 7, 217, 294, 307.
Rushin *v.* Shields, 11 Ga. 636, § 225.
Rushton *v.* Aspinwall, 1 Doug. 653, § 1401.
Russell *v.* Buck, 11 Vt. 166, § 394.
v. Clark, 7 Cranch, 69, §§ 386, 389.
v. Dyer, 40 N. H. 173, § 1097.
v. Hoyt, 4 Mont. 412, § 1410.
v. Longstaffe, 1 Doug. 495, § 991.
v. Martin, 15 Tex. 238, § 1410.
v. Perkins, 1 Mason, 368, §§ 389, 401.
v. Petree, 10 B. Mon. 184, §§ 17, 36.
v. Sargent, 7 Ill. App. 98, § 1412.
v. Sweezey, 22 Mich. 235, §§ 65*a*, 672, 674.
Russell M'f'g Co. *v.* Steamboat Co. 50 N. Y. 121, §§ 564, 577*a*.
Russell's Appeal, 15 Pa. St. 319, § 113.
Rutherford *v.* Geddes, 4 Wall. 220, § 1249.
Rutland Bank *v.* Buck, 5 Wend. 66, § 94*b*.
Rutledge *v.* Sup. Ct. (Cal.) 6 W. Coast Rep. 565, § 1211.
Rutter *v.* Barr, 4 Ohio, 446, § 15.
Ryall *v.* Rowles, 1 Ves. Sen. 348, § 433.
Ryan *v.* Driscoll, 83 Ill. 415, § 1161.
Ryland *v.* Brown, 2 Head, 270, § 92*a*.

S.

Saco National Bank *v.* Sanborn, 63 Me. 340, § 923.
Sackett *v.* Kellar, 22 Ohio St. 554, § 94*a*.
Satfron, etc. Soc. *v.* Rayner, L. R. 14 Ch. D. 406, §§ 433, 672.
Sager *v.* P. S. etc. R. Co. 31 Me. 228, § 558.
Sailor *v.* Hertzog, 4 Whart. 259, § 278.

Salisbury *v.* Morse, 7 Lans. 359, § 341.
v. Renick, 44 Mo. 554, § 956.
v. Sands, 2 Dill. 270, § 1352.
Sallee *v.* Hays, 3 Mo. 116, § 1084.
Saltus *v.* Everett, 20 Wend. 267, § 67.
Sample *v.* Martin, 16 Ind. 226, §§ 420, 422.
Sampson *v.* Ohleyer, 22 Cal. 200, § 374.
Samuels *v.* Shelton, 48 Mo. 444, § 348.
Sanborn *v.* Little, 3 N. H. 539, §§ 79, 431.
v. Robinson, 54 N. H. 239, § 310.
Sandford *v.* Handy, 23 Wend. 260, § 653.
Sandilands *v.* Marsh, 2 B. & Ald. 673, § 527.
Sanford *v.* Harvey, 11 Cush. 93, § 633.
Sanger *v.* Craigue, 10 Vt. 555, §§ 159, 174.
Sarahass *v.* Armstrong, 16 Kan. 192, § 1408.
Sargent *v.* Bean, 7 Gray. 125, § 1110.
Sargeant *v.* Ingersoll, 7 Pa. St. 340, § 279.
v. State Bank of Indiana, 12 How. 371, § 1085.
Saunders *v.* Dehew, 2 Vern. 271, §§ 48, 58.
v. Smith, 3 Ga. 121, § 1190.
Savings, etc. Soc. *v.* Thompson, 32 Cal. 347, § 1071.
Sawyer *v.* Adams, 8 Vt. 172, § 160.
v. Brownell, 13 R. I. 141, § 738.
v. Joslin, 20 Vt. 172, § 464.
v. North Am. Life Ins. Co. 46 Vt. 697, § 1304.
Sawyer's *v.* Pawner's Bank, 6 Allen, 207, § 683*a*.
Sayer *v.* Frick, 7 W. & S. 383, § 757.
Sayles *v.* Davis, 20 Wis. 302, § 1372.
Scales *v.* Alvis, 12 Ala. 617, § 1111.
v. Wilsey, 11 Ia. 261, § 97.
Scarborough *v.* Harris, 1 Bay, 177, § 1017.
Scarlett *v.* Gorham, 28 Ill. 319, §§ 360, 368.
Schell *v.* Leland, 45 Mo. 289, § 1032.
v. Stein, 76 Pa. St. 398, § 164.
Schepp *v.* Carpenter, 51 N. Y. 602, § 94*b*.
Schimmelpenich *v.* Bayard, 1 Pet. 264, §§ 660, 661.
Schlater *v.* Winpenny, 75 Pa. St. 321, § 523.
Schley *v.* Merrit, 37 Md. 352, § 87.
Schnell *v.* Chicago, 38 Ill. 382, § 1075.
Schollenberger, *Ex parte*, 6 Rep. 5, § 1307.
Schonberg *v.* Cherry, 6 Thomp. & C. (N. Y.) 200; S. C. 3 Hun, 677, § 382.
School District *v.* Taylor, 19 Kan. 287, §§ 65*a*, 96, 273, 278.
v. Railroad, 102 Mass. 552, § 558.
Schuchardt *v.* Hall, 36 Md. 590, § 1004.
Schultz *v.* Moore, 1 McLean, 520, § 124.
Schutt *v.* Large, 6 Barb. 373, §§ 63, 96, 113, 203.
Schuyler *v.* Leggett, 2 Cow. 660, § 586.
v. Smith, 51 N. Y. 309, § 602.
Schwabacker *v.* Reilly, 2 Dill. 127, § 1295.
Scofield *v.* Eichelberger, 7 Pet. 586, § 981.
Scorpion S. M. Co. *v.* Marsano, 10 Nev. 370, §§ 1030, 1309, 1355.
Scott *v.* Bullion M. Co. 2 Nev. 81, § 1249.
v. Colman, 5 Monr. 73, § 377.
v. Colmesnil, 7 J. J. Marsh. 416, § 492.
v. Dunbar, 1 Moll. 442, § 50.
v. Edwards, 19 Mo. 674, § 1414.
v. Gallagher, 14 S. & R. 333, §§ 294, 299, 300.
v. Greer, 10 Pa. St. 103, § 942.
v. Jackson, 12 La. An. 640, § 1413.
v. Jackson, 35 La. An. 769, § 1414.
v. Jones, 4 Taunt. 865, § 1263.
v. Lifford, 9 East, 347, §§ 716, 735.
v. Lord Hastings, 4 K. & J. 633, § 434.
v. Scott, 17 Md. 78, §§ 1251, 1414.
v. Whitney, 41 Wis. 504, § 480*n*.
Scroggins *v.* Dugal, 8 Ala. 382, § 65*a*.
Scuddar *v.* Van Amburgh, 4 Edw. Ch. 29, § 371.
Scull *v.* Mason, 43 Pa. St. 99, § 936.

Scully *v.* Murray, 34 Mo. 420, § 613.
Seabrook *v.* Brady, 47 Ga. 650, §§ 339, 342*a*.
Seabury *v.* Hungerford, 2 Hill, 80, § 1024.
Seacord *v.* Miller, 13 N. Y. 55, § 946.
Sears *v.* Munson, 23 Ia. 380, §§ 65*a*, 273.
v. Van Dusen, 25 Mich. 351, § 417.
Seaton *v.* Scoville, 18 Kan. 435, § 735.
Seaver *v.* Fitzgerald, 23 Cal. 85, § 1039.
Secomb *v.* Nutt, 14 B. Mon. 324, § 464.
Sedgwick *v.* Cleveland, 7 Paige, 287, § 341.
Self *v.* Maddox, 1 Vern. 459, § 348.
Selking *v.* Hebel, 1 Mo. App. 340, § 112.
Selway *v.* Halloway, 1 Ld. Raym. 46, § 532.
Semple *v.* Hagar, 27 Cal. 163, § 1404.
Senter *v.* Turner, 10 Ia. 517, § 96.
Sergeant *v.* Ingersoll, 7 Pa. St. 340; 15 Pa. St. 343, §§ 10, 18, 279, 328.
Sessions *v.* West. R. Corp. 16 Gray, 132, § 567.
Setter *v.* Alvey, 15 Kan. 157, § 226.
Sexton *v.* Rhames, 13 Wis. 99, §§ 1031, 1119.
Seybell *v.* National Cur. Bank, 54 N. Y. 288, §§ 80, 89.
Seymour *v.* Newton, 105 Mass. 272, §§ 464, 477.
Shackelton *v.* Sutcliffe, 1 De G. & Sm. 609, § 65*a*.
Shade *v.* Payne, 14 La. An. 453, § 576.
Shannon *v.* Hall, 72 Ill. 354, §§ 152, 153.
Sharp *v.* Arbuthnot, 13 Jur. 219, § 80.
v. Bailey, 9 B. & C. 44, § 997.
v. Lumley, 34 Cal. 611, § 374.
v. Maguire, 19 Cal. 577, § 348.
Sharpe *v.* Kelley, 5 Den. 431, § 598.
Shaw *v.* Neal, 19 La. 156, § 984.
v. Padley, 64 Mo. 519, § 348.
v. Poor, 6 Pick. 86, § 129.
v. Railroad Co. 101 U. S. 557, § 80.
v. State, 3 Sneed, 86, § 1407.
v. Wilshire, 65 Me. 485, § 189.
Shawhan *v.* Laffen, 24 Ia. 217, §§ 1160, 1161.
Shaylor *v.* Mix, 4 Allen, 351, §§ 830, 850.
Shed *v.* Brett, 1 Pick. 401, §§ 781, 882.
Sheets *v.* Andrews, 2 Blackf. 274, § 480*c*.
Shelburne Falls Bank *v.* Townsley, 107 Mass. 444, §§ 843, 846.
Shelburne Falls National Bank *v.* Townsley, 102 Mass. 177, § 910.
Shelby *v.* Judd, 24 Kan. 161, § 738.
Sheldon *v.* Benham, 4 Hill, 129, § 846.
v. Chapman, 31 N. Y. 644, § 940.
v. Cox, 2 Edm. 224, §§ 15, 672.
v. Wright, 5 N. Y. 497; 7 Barb. 39, §§ 1077, 1160.
Shelton *v.* Johnson, 4 Sneed, 672, § 371.
v. Merchants' D. T. Co. 59 N. Y. 258, § 557.
Shenck *v.* Propeller Co. 60 Pa. St. 109, § 566.
Shepard *v.* Giddings, 22 Conn. 282, § 1272.
v. Hawley, 1 Conn. 369, § 758.
v. Shepard, 36 Mich. 173, §§ 29, 185.
Shepardson *v.* Stevens, 71 Ill. 646, §§ 10, 65*a*, 279.
Sherfy *v.* Argenbright, 1 Heisk. 128, § 146.
Sheridan *v.* Andrews, 49 N. Y. 478, § 374.
Shields *v.* Mitchell, 10 Yerg. 8, § 96.
Shimmin *v.* Inman, 26 Me. 228, § 1110.
Ship Grafton, The, Olcott's R. 43, § 563.
Shirley *v.* Fellow, 9 Port. (Ala.) 300, § 1003.
v. Hagar, 3 Blatchf. 225, § 1159.
Shirras *v.* Caig, 7 Cranch, 34, § 272.
Shoemaker *v.* Mech. Bank, 59 Pa. St. 79, § 870.
Shotwell *v.* Harrison, 30 Mich. 179, §§ 11, 270.
v. Rowell, 30 Ga. 557, § 1185.
Shove *v.* Larsen, 22 Wis. 142, § 169.
Shreve *v.* Dulany, 1 Cranch, C. Ct. 499, § 1286.
Shults *v.* Moore, 1 McLean, 520, § 124.
Shultz *v.* Depuy, 3 Abb. Pr. 252, §§ 1387, 1397.
Shumate *v.* Reavis, 49 Mo. 333, § 273.
Shurlds *v.* Tilson, 2 McLean, 458, §§ 504, 506.

Sibley *v.* Leffingwell, 8 Allen, 584, §§ 14, 274.
v. Muskegan N. B. 41 Mich. 196, § 87.
Sidwell *v.* Worthington, 8 Dana, 74, § 348.
Sigerson *v.* Mathews, 20 How. 496, § 964.
Sigourney *v.* Munn, 7 Conn. 324, §§ 26, 320.
Silsby *v.* Allen, 43 Vt. 172, § 586.
Simcock *v.* First National Bank of Emporia, 14 Kan. 529, § 1358.
Simington *v.* Kent, 8 Ala. 691, §§ 1282, 1290.
Simms *v.* Southern Ex. Co. 38 Ga. 129, § 1405.
Simon *v.* The Fung Shuey, 21 La. An. 363, § 553.
Simonds *v.* Strong, 24 Vt. 642, § 504.
Simons *v.* Gardner, 6 R. I. 255, § 1336.
v. Great W. R. Co. 37 Eng. L. & Eq. 286, § 561.
Simpson *v.* Burch, 6 Thomp. & C. 560; 4 Hun, 315, § 1038.
v. Knight, 3 Kan. 172, § 128.
v. Knight, 12 Fla. 144, §§ 1138, 1144.
v. Mundee, 3 Kan. 172, § 128.
v. Terney, 5 Humph. 419, § 799.
Sims *v.* Hammond, 33 Ia. 368, §§ 203, 231*a*.
v. Marryatt, 17 Q. B. 281, § 1404.
Sinclair *v.* Stevenson, 1 Carr. & P. 582, § 1277.
Siter *v.* McClanachan, 2 Gratt. 280, § 113.
Skiffen *v.* Wray, 6 East, 371, § 479.
Skilding *v.* Warren, 15 Johns. 270, § 92*a*.
Slater *v.* Breese, 36 Mich. 77, § 185.
Sleat *v.* Fagg, 5 B. & Ald. 342, § 558.
Sleeper *v.* Chapman, 121 Mass. 404, § 322.
Slim *v.* Croucher, 1 De G. F. & J. 518, §§ 7, 35.
Slocomb *v.* Lizardi, 21 La. An. 355, §§ 751, 752.
v. Powers, 10 R. I. 255, § 1156.
Small *v.* Browder, 11 B. Mon. 212, § 432.
v. Smith, 1 Den. 583, § 94*a*.
Smalley *v.* Wright, 40 N. J. L. 471, § 764.
Smedes *v.* Utica Bank, 20 Johns. 371, §§ 714, 786, 829, 846.
Smith *v.* Anthony, 5 Mo. 504, §§ 395, 399.
v. Bainbridge, 6 Blackf. 12, § 416,
v. Beckett, 13 East, 187, § 991.
v. Branch Bank, 21 Ala. 125, § 96.
v. Brown, 9 Leigh, 293, §§ 367, 373.
v. Capron, 7 Hare, 191, §§ 46, 321.
v. Compton, 3 B. & Ad. 407, § 480*l*.
v. Curlee, 59 Ill. 221, § 956.
v. Dall, 13 Cal. 510, § 281.
v. Denton, 42 Ia. 48, §§ 48, 316, 672, 674.
v. Gibson, 15 Minn. 89, §§ 96, 277, 279, 373.
v. Horne, 8 Taunt. 144, § 558.
v. Ide, 3 Vt. 290, §§ 386, 401.
v. Little, 10 N. H. 526, § 781.
v. Littlefield, 51 N. Y. 539, § 596.
v. Lockridge, 8 Bush, 423, § 936.
v. Mullet, 2 Camp. 208, § 803.
v. Nashua, etc. R. Co. 27 N. H. 86, §§ 570, 571, 574.
v. Pattison, 45 Miss. 619, § 1384.
v. Railroad, 64 N. C. 235, § 553.
v. Randall, 6 Cal. 47, § 1096.
v. Reese R. Co. L. R. 2 Eq. 264, §§ 10, 35.
v. Roach, 7 B. Mon. 17, § 798.
v. Shane, 1 McLean, 22, § 44.
v. Sparrow, 4 Bing. 84, § 677.
v. Smith, 13 Ohio St. 532, § 225.
v. Smith, 2 Cr. & M. Exch. 231, § 439.
v. Stewart, 6 Johns. 46, § 593.
v. Tallapoosa Co. 2 Woods, 574, § 1404.
v. Thatcher, 4 B. & Ald. 200, § 744.
v. Trabue, 1 McLean, 87, § 343.
v. Water Com'rs, 38 Conn. 208, §§ 683, 683*b*.
v. Wells' Adm'rs, 4 Bush (Ky.), 92, § 1197.
v. Whiting, 12 Mass. 6, §§ 480*o*, 839.
v. Yule, 31 Cal. 180, §§ 96, 280, 289, 297.
Smith's Appeal, 47 Pa. St. 128, § 688.
Smout *v.* Ilbery, 10 M. & W. 1, § 671.

Snee *v.* Prescot, 1 Atk. 245, § 477.
Snider *v.* Adams Ex. Co. 63 Mo. 376, § 553.
v. Snider, 3 Phila. 160, § 226.
Snodgrass *v.* Bicketts, 13 Cal. 360, § 96.
Snow *v.* Perry, 9 Pick. 542, § 660.
Snydacker *v.* Brosse, 51 Ill. 357, § 1296.
Snyder *v.* Sponable, 1 Hill, 567, §§ 680, 684.
Soeding *v.* Bartlett, 35 Mo. 90, § 1399.
Solomon *v.* Hughes, 24 Kan. 211, § 1409.
v. S. B. Co. 2 Daly (N. Y.), 104, § 577*a*.
Solyer *v.* Romanet, 52 Tex. 562, § 1410.
Somers *v.* Schmidt, 24 Wis. 417; 1 Am. Rep. 191, §§ 480*d*, 480*f*.
Somes *v.* Brewer, 2 Pick. 184, § 241.
v. Skinner, 3 Pick. 52, §§ 214, 216.
Sorrel *v.* Carpenter, 2 P. Wms. 482, §§ 338, 348.
Souder *v.* Morrow, 33 Pa. St. 83, § 208.
Soule *v.* Chase, 1 Rob. (N. Y.) 222, §§ 1061, 1067, 1078, 1080.
South, etc. R. Co. *v.* Henlein, 52 Ala. 486, § 558.
Southard *v.* McBrown, 63 Cal. 545, § 430.
Southern *v.* Grim, 67 Ill. 106, § 515.
Southern Ex. Co. *v.* Moon, 39 Miss. 822, § 553.
Southern, etc. R. Co. *v.* Pilgreen, 62 Ala. 305, § 1417.
Southern & Atlantic Tel. Co. *v.* N. O. etc. R. Co. 2 Cent. L. J. 88, §§ 1306, 1308.
Southwestern R'y *v.* Felder, 46 Ga. 433, § 566.
Southwick *v.* McGovern, 28 Ia. 533, § 515.
Sowards *v.* Pritchett, 37 Ill. 517, § 1104.
Spadan *v.* Manvel, 2 Daly, 263, § 674.
Spade *v.* Hudson R'y, 16 Barb. 383, § 532.
Spader *v.* Lawler, 17 Ohio, 371, § 225.
Spain *v.* Hamilton's Ex'rs, 1 Wall. 604, § 436.
Spalding *v.* Butts, 6 Conn. 28, § 348.
v. Chicago, etc. R. Co. 30 Wis. 110, § 480*k*.
Spalding *v.* Krutz, 1 Dill. C. C. 414, § 823.
Spaulding *v.* Ludlow, etc. Mills, 36 Vt. 150, § 1245.
Spear *v.* Ditty, 9 Vt. 282, § 1107.
Speck *v.* Riggin, 40 Mo. 405, § 16.
Specht *v.* Detroit, 20 Mich. 168, § 1127.
Speer *v.* Bishop, 24 Ohio St. 598, § 520.
v. Evans, 47 Pa. St. 141, § 164.
Spencer *v.* Ballou, 18 N. Y. 331, §§ 94*b*, 225.
v. Bank of Salina, 3 Hill, 520, § 917.
v. Hall, 1 East, 688, § 1181.
v. Harvey, 17 Wend. 489, § 946.
v. Wilson, 4 Munf. 130, § 671.
Spiers *v.* Halstead, 71 N. C. 209, § 1034.
Spofford *v.* Weston, 29 Me. 140, §§ 30, 245, 277.
Spooner *v.* Gardiner, Ry. & Mood. 84, § 1012.
v. Thompson, 48 Vt. 259, § 664.
Sprague *v.* Quinn, 108 Mass. 553, § 585.
v. Tyson, 44 Ala. 338, § 918.
Sprowle *v.* Lawrence, 33 Ala. 674, § 1415.
Spunner *v.* Walsh, 10 Ir. Eq. 386, § 46.
Spurgin *v.* McPheeters, 42 Ind. 527, § 94*a*.
Spurlock *v.* Sullivan, 36 Tex. 511, § 25.
v. Union Bank, 4 Humph. 336, § 957.
St. Andrews *v.* Lockwood, 2 Root, 239, § 113.
St. John *v.* Conger, 40 Ill. 535, §§ 192, 205.
v. Roberts, 31 N. Y. 441, § 740.
Stafford *v.* Ballou, 17 Vt. 329, § 10.
v. Low, 16 Johns. 67, § 393.
v. Yates, 18 Johns. 327, §§ 706, 707.
Stainback *v.* Bank of Virginia, 11 Gratt. 269, § 657.
Stainor *v.* Tysen, 3 Hill (N. Y.), 279, § 660.
Stanley *v.* Chamberlain, 31 N. J. L. 565, §§ 31, 673*a*.
Stansell *v.* Roberts, 13 Ohio, 148, §§ 225, 231*a*.
Stanton *v.* Blossom, 14 Mass. 116, §§ 705, 707, 1027.
Staples *v.* Fenton, 5 Hun, 172, § 297.

Staples *v.* Okines, 3 Esp. 332, § 1000.
Starkweather *v.* Morgan, 15 Kan. 274, § 1380.
State *v.* Bailey, 16 Ind. 46, § 1404.
v. Baird, 9 Kan. 60, § 1210.
v. Bassett, 33 N. J. L. 26, § 1254.
v. Brandon, 6 Kan. 243, § 1210.
v. Cumberland, 7 R. I. 75, § 480*g*.
v. Edwards, 19 Mo. 674, § 1414.
v. First National Bank, 4 Nev. 358, §§ 1202, 1329.
v. Gurnee, 14 Kan. 111, § 1260.
v. H. & St. J. R. Co. 51 Mo. 532, § 1311.
v. Hayes, 78 Mo. 307, § 1416.
v. Hinchman, 27 Pa. St. 479, § 1405.
v. Intoxicating Liq. 73 Me. 278, § 1417.
v. Jackson, 39 Me. 291, § 1410.
v. Jackson, 35 La. An. 769, § 1414.
v. Jarrett, 17 Md. 309, § 1404.
v. Johnson, 26 Minn. 316, § 1416.
v. Leiber, 11 Ia. 407, § 1409.
v. Mayberry, 48 Me. 218, § 1262.
v. Merrick, 15 Ia. 123, § 1412.
v. Parrott, 71 N. C. 311, § 480*h*.
v. Postlewait, 14 Ia. 446, § 1413.
v. Powers, 25 Conn. 48, § 1411.
v. Reader, 60 Ia. 527, § 1410.
v. Shilling, 14 Ia. 445, § 1413.
v. Townsend, 37 Ala. 247, § 554.
v. Williams, 5 Wis. 308, § 1412.
v. Wise, 7 Ind. 645, § 1409.
State Bank *v.* Brown, 12 Ark. 94, § 348.
v. Cason, 10 Ark. 479, § 348.
v. Marsh, 10 Ark. 129, § 1363.
v. Slaughter, 7 Blackf. 133, § 759.
State Mut. Fire Ins. Co. *v.* Roberts, 31 Pa. St. §§ 438, 446.
Stearns *v.* Gage, 79 N. Y. 102, §§ 65*a*, 279.
Stebbins *v.* Globe Ins. Co. 2 Hall, 632, § 480*n*.
Stedman *v.* Gooch, 1 Esp. 3, § 851.
Steedman *v.* Poole, 16 L. J. Ch. 349; 6 Hare, 193, §§ 15, 30, 48, 313, 328.
Steel *v.* Mansell, 6 Rich. 437, § 101.
v. Merced Co. 62 Cal. 6, § 1217.
Steele *v.* Townsend, 37 Ala. 247, § 553.
Steinbach *v.* Lesse, 27 Cal. 295, § 1358.
Steinle *v.* Bell, 12 Abb. Pr. (N. S.) 171, § 1044.
Stephen Hart, The, Blatch. Prize Cas. 387, § 1417.
v. Thompson, 28 Vt. 77, § 1234.
Stephenson *v.* Dickson, 24 Pa. St. 148, § 805.
v. Primrose, 8 Port. (Ala.) 155, § 943.
v. Rosse, 5 Ir. Ch. 401, § 11.
v. State, 28 Ind. 272, § 1417.
Sterling *v.* Peet, 14 Conn. 245, § 480*c*.
Sterling Bridge Co. *v.* Baker, 75 Ill. 139, §§ 672, 677.
Sterry *v.* Arden, 1 Johns. Ch. 261, §§ 10, 38.
Stetson *v.* Gulliver, 2 Cush. 494, § 96.
Stevens *v.* Brown, 3 Vt. 420, § 192.
v. Curry, 10 Minn. 316, § 1174.
v. Goodenough, 26 Vt. 676, § 59.
v. Hampton, 46 Mo. 404, §§ 134, 135.
v. Lynch, 12 East, 38, § 975.
v. Monongahela Nat'l Bank, 87 Pa. St. 163, § 94*a*.
v. Morse, 47 N. H. 532, §§ 112, 125.
v. Reeves, 9 Pick. 198, § 480*o*.
v. Stevens, 1 Ashm. (Pa.) 190, § 434.
Steward *v.* Hadley, 55 Mo. 235, § 480*c*.
Stewart *v.* Clark, 13 Metc. 79, § 96.
v. Eden, 2 Cai. 121, § 763.
v. Freeman, 10 Harris, 123, § 96.
v. Harding, 2 Gray, 335, § 631.
v. Hibernia Banking Ass'n, 78 Ill. 596, § 1358.
v. Huff, 19 Ia. 557, § 97.
v. Kennett, 2 Camp. 177, § 705.
v. McSweeny, 14 Wis. 468, §§ 192, 193.
v. Pettigrew, 28 Ark. 372, § 1094.
v. Sonneborne, 49 Ala. 178, § 502.
v. Wood, 63 Mo. 252, § 21.
Stewart's Case, L. R. 1 Ch. App. 574, § 35.
Stewton *v.* Cushe, Yelv. 37, § 1394.
Stidham *v.* Matthews, 29 Ark. 650, §§ 307, 310.
Stillwell *v.* Empire F. Ins. Co. 4 Cent. L. J. 463, §§ 1307, 1308.
Stitt *v.* Huidekopers, 17 Wall. 384, § 1279.
Stivers *v.* Thompson, 15 Ia. 1, § 1188.

Stix *v.* Matthews, 63 Mo. 371, §§ 910, 956, 968.
Stockbridge R'y Bill, *Ex parte*, L. R. 2 Eq. 364, § 1404.
Stockdale *v.* Housard, 9 Ad. & L. 107; 4 Jur. 70; 3 P. D. 330, § 1404.
v. Keys, 79 Pa. St. 251, § 85.
Stockett *v.* Taylor, 3 Md. Ch. Dec. 537, § 24.
Stockton *v.* Hall, Hard. (Ky.) 160, § 434.
Stocks *v.* Dobson, 19 E. L. & E. 96, § 431.
Stoddard *v.* Kimball, 6 Cush. 469, § 94*b*.
v. Myers, 8 Ohio, 203, §§ 358, 377.
Stone *v.* Connelly, 1 Metc. (Ky.) 652, § 351.
v. Cook, 79 Ill. 424, § 304.
v. Elliott, 11 Ohio St. 252, § 372.
Story *v.* Black (Mont.), 1 Pac. Rep. 1, § 273.
Stoughton *v.* Pasco, 5 Conn. 442, § 180.
Stout *v.* Hyatt, 13 Kan. 232, § 316.
v. Jackson, 2 Rand. 132, § 480*c*.
Stowe *v.* N. Y. etc. R. Co. 113 Mass. 521, §§ 563, 566.
Straight *v.* Harris, 14 Wis. 509, § 203.
Strang *v.* Allen, 44 Ill. 428, § 1204.
Strickland *v.* Kirk, 51 Miss. 795, §§ 65*a*, 273, 279.
Strong *v.* Smith, 3 McLean, 362, §§ 112, 125.
v. Taylor, 2 Hill, 326, § 72.
Stronghill *v.* Anstey, 1 De G. M. & G. 635, § 22.
Struver *v.* Ocean Ins. Co. 9 Abb. Pr. 23, § 1328.
Stubbs *v.* Lund, 7 Mass. 453, § 464.
Studebaker *v.* Cody, 54 Ind. 586, §§ 420, 422.
Sturgis *v.* Fay, 16 Ind. 429, § 1343.
Sturtevant *v.* Orser, 24 N. Y. 538, § 466.
Stuyvesant *v.* Hone, 2 Barb. Ch. 151; 1 Sandf. Ch. 419, §§ 203, 204, 360, 361, 368.
Sueterlee *v.* Sir, 25 Wis. 357, § 1040.
Suffield *v.* Brown, 9 Jur. (N. S.) 999; 33 L. J. Ch. 256, § 65*a*.
Sugart *v.* Mays, 54 Ga. 554, § 480*n*.
Suit *v.* Woodhall, 113 Mass. 391, §§ 672, 677, 683, 683*a*, 690.
Sullivan *v.* Heuse, 2 Colo. 424, § 1408.
Summerville *v.* R. & St. J. R. Co. 62 Mo. 391, § 668.
Sumner *v.* Bryan, 54 Ga. 613, § 268.
v. Rhodes, 14 Conn. 135, §§ 112, 125.
Surman *v.* Barlow, 2 Edm. 167, §§ 15, 313.
Sussex Bank *v.* Baldwin, 17 N. J. L. 487, §§ 715, 795, 805, 817, 1021.
Sutcliffe *v.* McDowel, 2 Nott & McC. 251, § 1009.
Sutton *v.* Board of Police, 41 Miss. 236, § 480*g*.
v. Tatham, 10 Ad. & El. 27, § 480*o*.
Swall *v.* Clarke, 51 Cal. 227, §§ 84, 91.
Swan *v.* Hodges, 3 Head, 251, § 960.
Swarthout *v.* Curtis, 5 N. Y. 301, §§ 10, 20, 65.
Swayze *v.* Britton, 17 Kan. 627, § 707.
Sweet *v.* Patrick, 3 Fairf. 1, § 480*c*.
v. Sprague, 55 Me. 190, § 1072.
Swift *v.* Smith, 102 U. S. 442, § 94.
v. Tyson, 16 Pet. 1, §§ 80, 84.
Swigert *v.* Bank of Kentucky, 17 B. Mon. 268, §§ 103, 257.
Sykes *v.* Halstead, 1 Sandf. 483, § 671.
Sylvester *v.* Downer, 20 Vt. 355, § 87.
v. Downer, 18 Vt. 32, § 1388.
Syme *v.* Stewart, 17 La. An. 73, § 1405.
Symmes *v.* Major, 21 Ind. 443, § 1413.

T.

Tact *v.* Crawford, 1 McCord, 265, § 101.
Talbot *v.* Bedford, Cooke (Tenn.), 447, § 480*c*.
v. Gay, 18 Pick. 534, §§ 388, 413.
Tallman *v.* White, 2 N. Y. 66, § 1109.
Talman *v.* Barnes, 12 Wend. 227, § 1328.
Tankard *v.* Tankard, 79 N. C. 54, §§ 65*a*, 273, 278, 283.
Tanner *v.* Florence, 1 Ch. Cas. 259, §§ 15, 308, 321.
Tardy *v.* Boyd, 26 Gratt. 631, § 985.
Tarrant *v.* Blanchard, 1 De G. J. & S. 107, § 11.
Tate *v.* Stooltzfoods, 16 S. & R. 35, § 127.
Taunton Bank *v.* Richardson, 5 Pick. 436, §§ 942, 1397.

Taunton Copper Co. *v.* Merch. Ins. Co. 22 Pick. 108, § 480*n*.
Taylor *v.* Ætna Life Ins. Co. 13 Gray, 434, §§ 480*n*.
v. Baker, 5 Price, 306, §§ 15, 30, 313.
v. Doe, 13 How. 287, § 238.
v. French, 4 E. D. Smith, 458, §§ 946, 951.
v. Graham, 18 La. An. 656, § 1404.
v. Hughes, 2 Jones & L. 24, § 676.
v. Kelly, 3 Jones Eq. 240, §§ 273, 278.
v. Lowenstein, 50 Miss. 278, §§ 246, 278.
v. Maris' Ex'rs, 5 Rawle, 51, § 203.
v. Ross, 3 Yerg. 330, §§ 386, 396.
v. Snyder, 3 Den. 145, § 991.
v. Stibbert, 2 Ves. Jr. 437. §§ 48, 55, 278, 279, 281, 313.
v. Thomas, 5 N. J. Eq. 331, § 97.
v. Young, 3 Watts, 339, § 1020.
Tebbets *v.* Dowd, 23 Wend. 379, §§ 956, 960, 969. 971.
Tefft *v.* Munson, 57 N. Y. 97, § 216.
Telegraph Co. *v.* Griswold, 37 Ohio St. 301, § 555.
Temple *v.* State, 15 Tex. App. 304; 49 Am. Rep. 200, § 1411.
v. The People, 6 Bradw. 378, § 150.
Templeton *v.* Morgan, 16 La. An. 438, § 1413.
Terrel *v.* Andrew Co. 44 Mo. 309, §§ 147, 149, 167.
v. Bank of Mobile, 12 Ala. 502, § 683*a*.
Terry *v.* Merch. Bank, 66 Ga. 177, § 1408.
v. Milwaukee, 15 Wis. 490, § 1404.
Texas *v.* White, 7 Wall. 733, § 146.
Thackery *v.* Blackett, 3 Camp. 164, § 991.
Tharpe *v.* Dunlap, 4 Heisk. 674, §§ 339, 342*a*.
Thatcher *v.* Morris, 11 N. Y. 437, § 1405.
v. West. R. Nat'l Bank, 19 Mich. 196, § 94*a*.
Thayer *v.* Daniels, 113 Mass. 129, § 436.
Thillman *v.* Gueble, 32 La. An. 260, § 735.
Third National Bank *v.* Lange, 51 Md. 138, § 87.
Thomas *v.* Blackmore, 5 Yerg. 113, § 96.
v. Bost. & P. R. Co. 10 Metc. 472, § 566.
v. Davis, 7 B. Mon. 227, § 1230.
v. Grand G. Bank, 9 Sm. & M. 201, §§ 112, 125, 589, 394.
v. Hubbell, 15 N. Y. 405, § 480*l*.
v. Kennedy, 24 Ia. 397, § 229.
Thomason *v.* Frere, 10 East, 418, § 497.
Thompson *v.* Cartwright, 33 Beav. 178, §§ 688, 690.
v. Glover (Ky.), 16 Cent. L. J. 16; 8 Rep. 589, §§ 394, 406.
v. Hamilton, 12 Pick. 426, § 480*n*.
v. Haskell, 21 Ill. 215, § 1412.
v. Pioche, 44 Cal. 508, §§ 96, 274, 280, 286.
v. Posten, 1 Duv. 415, § 94*b*.
v. Railroad, 28 Md. 396, § 457.
v. Simpson, 1 Dr. & War. 459, § 104.
v. Speirs, 13 Sm. 469, § 433.
v. Whitman, 18 Wall. 457, § 1379.
v. Wilcox, 7 Lans. 376, § 208.
v. Williams, 14 Cal. 160, §§ 738, 831.
Thorington *v.* Smith, 8 Wall. 1, § 146.
Thornber *v.* Sheard, 12 Beav. 589, § 29.
Thornhill *v.* Burthe, 29 La. An. 639, § 185.
Thornton *v.* Knox, 6 B. Mon. 74, § 330.
v. Wynn, 12 Wheat. 183, § 956.
Thorp *v.* Merrill, 21 Minn. 336, § 176.
Thorpe *v.* Peck, 28 Vt. 127, § 781.
Thrall *v.* Horton, 44 Vt. 386, § 94*a*.
Throckmorton *v.* Price, 28 Tex. 605, §§ 150, 154.
Thunder *v.* Belcher, 3 East, 449, § 600.
Thurber *v.* Dwyer, 10 R. I. 355, § 586.
Tibbals *v.* Jacobs, 31 Conn. 428, § 143*a*.
Tichnor, *In re*, 35 Beav. 317, § 437.
Tiffany *v.* Boatman's Inst. 18 Wall. 375, § 683*b*.
Tiffin *v.* Millington, 3 Mo. 418, §§ 1209, 1211.

Tigress, The, 32 L. J. Adm. 97; 9 Jur. N. S. 361, §§ 471, 477.
Tildesley *v.* Lodge, 3 Smale & G. 543, § 11.
Tillinghast *v.* Champlin, 4 R. I. 173, § 26.
Tilton *v.* Hunter, 24 Me. 29, §§ 205, 210, 223.
Timlow *v.* Phila. etc. R. Co. 99 Pa. St. 284, § 1403.
Timms *v.* Delisle, 5 Blackf. 447, §§ 844, 883.
Timson *v.* Ramsbottom, 2 Keen, 35, § 437.
Tindal *v.* Brown, 1 T. R. 164, §§ 702, 703, 785.
Titchburne *v.* White, 1 Str. 145, § 544.
Todd *v.* Edwards, 7 Bush. 89, § 846.
v. Outlaw, 79 N. C. 235, § 374.
Toledo, etc. Ins. Co. *v.* Speares, 16 Ind. 52, § 480*n*.
Toledo, etc. R. Co. *v.* Butler, 53 Ill. 323, § 1381.
Tombeckbee Bank *v.* Dumell, 5 Mason, 66, § 483.
Tompkins *v.* Wiltberger, 56 Ill. 385, § 1372.
Tongue *v.* Morton, 6 Har. & J. 21, § 339.
Torrey *v.* Foss, 40 Me. 74, § 998.
Towdy *v.* Ellis, 22 Cal. 650, § 1327.
Towle *v.* Leavitt, 23 N. H. 36, §§ 660, 662.
Town of Waltham *v.* Kemper, 55 Ill. 346; 8 Am. Rep. 652, § 480*y*.
Townsend *v.* Lorain Bank, 2 Ohio, 345, § 840.
v. Tallent, 33 Cal. 45, §§ 1053, 1054, 1130.
Tracy *v.* Steam, etc. Co. 1 E. D. Smith (N. Y.), 349, § 1171.
Traders' Ins. Co. *v.* Roberts, 9 Wend. 404, § 446.
Trail *v.* Ellis, 16 Beav. 350, § 690.
Train *v.* Gold, 5 Pick. 380, § 489*l*.
v. Jones, 11 Vt. 444, §§ 386, 394, 402.
Trans. Co. *v.* Marshall, 37 Barb. 509, § 71.
Travis *v.* Brown, 43 Pa. St. 9, § 1233.
Treasurer *v.* Bishop, 39 Vt. 353, § 1411.
Tredway *v.* McDonald, 51 Ia. 663, § 374.
Trefts *v.* King, 18 Pa. St. 157, §§ 25, 40.
Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117, § 683*b*.
Trieber *v.* Commercial Bank of St. Louis, 31 Ark. 128, § 80.
Trigg *v.* Conway, 1 Houst. 538, § 1405.
Trimble *v.* Boothby, 14 Ohio, 109, § 357.
v. Thorn, 16 Johns. 152, § 969.
Tripe *v.* Marcy, 39 N. H. 439, § 208.
Triplett *v.* Hunt, 3 Dana, 126, § 717.
Tripp *v.* De Bow, 5 How. Pr. (N. Y.) 114, § 1209.
Trot *v.* McGavock, 1 Yerg. (Tenn.) 469, § 1097.
Trotter *v.* Grant, 2 Wend. 413, § 480*o*.
Troy City Bank *v.* Wilcox, 24 Wis. 671, §§ 288, 290.
True *v.* Collins, 3 Allen, 438, § 924.
v. Harding, 12 Me. 193, §§ 386, 401.
Truesdale *v.* Ford, 37 Ill. 210, §§ 246, 273, 278, 288.
Truitt *v.* Truitt, 38 Ind. 16, § 344.
Trull *v.* Bigelow, 16 Mass. 406, §§ 203, 241.
Truscott *v.* King, 6 Barb. 346, § 96.
Trustees, etc. *v.* Kirk, 84 N. Y. 220, § 280.
Tucker *v.* Adams, 52 Ala. 254, § 593.
v. Baker, 10 Johns. 270, § 625.
v. Harris, 13 Ga. 1, § 219.
v. Henzill, 4 Ired. Ch. R. 513, § 690.
v. State, 11 Md. 322, § 1414.
v. Tilton, 55 N. H. 223, § 271.
Tuckerman *v.* French, 7 Greenl. 115, § 402.
Tudor *v.* Perkins, 3 Day, 364, § 434.
Tullis *v.* Scott, 38 Tex. 537, § 1374.
Tunison *v.* Chamblin, 88 Ill. 378, §§ 273, 277, 279.
Tunno *v.* Lague, 2 Johns. Cas. 1, §§ 714, 979.
Tunstall *v.* Trapps, 3 Sim. 301, § 672.
v. Walker, 2 Sm. & M. 638, § 907.
Turnbull *v.* Bowyer, 40 N. Y. 456, § 1128.
Turner *v.* Babb, 60 Mo. 342, § 377.
v. Crebill, 1 Ohio, 372, §§ 357, 375.
v. Fish, 28 Miss. 306, § 1408.
v. Goodrich, 26 Vt. 708, § 480*e*.
v. Leach, 4 B. & Ald. 451, §§ 795, 797.
v. Liverpool Dock Co. 6 Exch. 543, § 464.

Turner's Adm'rs *v.* Patton, 49 Ala. 406, § 1411.
Tuttle *v.* Jackson, 6 Wend. 213, §§ 10, 65*a*, 231, 273.
Tweedale *v.* Tweedale, 23 Beav. 341, § 690.
Twyman *v.* Hawley, 24 Gratt. 512. § 593.
Tybee, The, 1 Woods, 358, §§ 573, 575.
Tybee *v.* Webb, 6 Beav. 552, §§ 47, 674, 688.
Tyly *v.* Morrice, Carthew, 485, § 542.
Tyson *v.* Smith, 1 Nev. & P. 784, § 480*n*.

U.

Unangst *v.* Hibler, 26 Pa. St. 150, § 391.
Underwood *v.* Jeans, 4 Harr. (Del.) 201, §§ 1097, 1098.
v. Lord Courtown, 2 Sch. & Lef. 40, § 104.
Unger *v.* Mooney, 63 Cal. 586, § 280.
Union Bank *v.* Grimshaw, 15 La. 321, §§ 711, 956.
v. Hyde, 6 Wheat. 572, § 935.
v. Willis, 8 Metc. 504, § 87.
Union, etc. Ins. Co. *v.* Campbell, 95 Ill. 267, § 143*a*.
Union Ex. Co. *v.* Graham, 26 Ohio St. 595, § 558.
Union Canal Co. *v.* Young, 1 Whart. 432, § 226.
Union Mining Co. *v.* Rocky Mountain National Bank, 2 Colo. 249, § 683*b*.
Union Steamboat Co. *v.* Knapp, 73 Ill. 506, § 571.
United States *v.* Am. Gold Coin, 1 Woolw. 217, § 1417.
v. Grossmayer, 9 Wall. 72, §§ 748, 980.
v. Hooe, 3 Cranch, 73, §§ 180, 272.
v. Jackson, 104 U. S. 41, §§ 1404, 1410.
v. Johnson, 2 Sawyer, 482, § 1411.
v. Palmer, 3 Wheat. 610, § 1413.
v. Turner, 11 How. 663, § 1405.
v. Vaughn, 3 Binn. 394, § 436.
v. Winchester, 2 McLean, 135, § 1257.
United States Bank *v.* Burke, 4 Blackf. 141, §§ 342*a*, 353.
v. Goddard, 5 Mass. 366, § 795.
United States Bank *v.* Southard, 17 N. J. L. 473, §§ 957, 973, 1021.
United States Ins. Co. *v.* Shriver, 3 Md. Ch. 381, §§ 113, 244, 254, 683*a*.
Upton *v.* Moore, 44 Vt. 552. § 431.
Uther *v.* Rich, 10 Ad. & El. 784, § 80.

V

Valentine *v.* Havener, 20 Mo. 133, § 239.
Valk *v.* Gaillard, 4 Str. 99, § 750.
v. Simmons, 4 Mason, 113, § 1009.
Van *v.* Corpe, 2 Mylne & K. 269, §§ 30, 321.
Van Aken *v.* Gleason, 34 Mich. 477 § 262.
Van Buskirk *v.* Hartford, etc. Ins. Co. 14 Conn. 141, § 436.
Van Doren *v.* Robinson, 16 N. J. Eq. 256, §§ 15, 313.
Van Hook *v.* Throckmorton, 8 Paige, 33, § 341.
Van Hoesen *v.* Van Alstyne, 3 Wend. 75, § 738.
Van Keuren *v.* Cent. R. Co. of N. J. 38 N. J. L. 165, §§ 279, 299.
v. Corkins, 66 N. Y. 77, § 431.
Van Lenven *v.* Lyke, 1 N. Y. 515, § 480*i*.
Van Omeron *v.* Dowick, 2 Camp. 44. § 1404.
Van Orden *v.* Johnson, 1 McCarter, 376, § 203.
Van Rensselaer *v.* Clark, 17 Wend. 25, § 199.
Van Santvoord *v.* St. John, 6 Hill, 157, § 576.
Van Thorniley *v.* Peters, 26 Ohio St. 471. §§ 147, 149.
Van Vechten *v.* Pruyn, 13 N. Y. 549, § 852.
Van Wart *v.* Woolley, 3 B. & C. 439, § 742.
Van Wickle *v.* Downing, 19 La. An. 83, § 957.
Van Wormer *v.* Albany, 15 Wend. 262, § 480*h*.
Van Wyck *v.* Hardy, 4 Abb. App. Dec. 496, § 1045.
Vance *v.* McNairy, 3 Yerg. 176, § 96.
Vandiver *v.* Roberts, 4 W. Va. 495, § 1372.

Vanduyne *v.* Vreeland, 12 N. J. Eq. 142, § 54.
Vassault *v.* Austin, 36 Cal. 691, § 96.
v. Seitz, 31 Cal. 225, § 1414.
Vattier *v.* Hinde, 7 Pet. 252, § 10.
Vaughn *v.* Greer, 38 Tex. 530, § 97.
v. Tracy, 22 Mo. 415; 25 Mo. 318, §§ 16, 275, 276.
Veazie *v.* Parker, 23 Me. 170, §§ 205, 207, 284.
Verges *v.* Prejean, 24 La. An. 78, §§ 147, 149.
Verner *v.* Switzer, 32 Pa. St. 208, § 541.
Vernon *v.* Manhattan Co. 22 Wend. 183; 17 Wend. 524, §§ 505, 511.
Viele *v.* Germania Ins. Co. 26 Ia. 9, § 956.
v. Judson, 82 N. Y. 32, § 149.
Vignolles *v.* Bowen, 12 Ir. Eq. 194, § 35.
Villard *v.* Robert, 1 Str. Eq. 393, § 119.
Vinal *v.* Richardson, 13 Allen, 521, §§ 415, 418.
Virden *v.* Ellsworth, 15 Ind. 144, § 416.
Virgin *v.* Wingfield, 54 Ga. 451, § 3.
Virginia, etc. Co. *v.* Sayers, 26 Gratt. 328, § 553.
Voorhees *v.* Atlee, 29 Ia. 49, § 936.
Vorhees *v.* Bank of U. S. 10 Pet. 449, §§ 1057, 1085.
Vulliamy *v.* Noble, 3 Meriv. 592, § 496.
Vyse *v.* Wakefield, 6 M. & W. 442, §§ 418, 420.

W.

Waffle *v.* Goble, 53 Barb. 517, § 1033.
Wagner *v.* Diedrich, 50 Mo. 484, § 94*a*.
v. Tice, 36 Ia. 599, § 1189.
Wailes *v.* Cooper, 24 Miss. 208, §§ 10, 29, 307.
Waldy *v.* Gray, L. R. 20 Eq. 238, § 690.
Walker *v.* Allen, 72 Ala. 456, § 1415.
v. Bank of State, 8 Mo. 704, § 702.
v. Forbes, 25 Ala. 139, §§ 395, 397, 426.
v. Gilbert, 1 Freem. Ch. 75, §§ 44, 97, 103.
Walker *v.* Jackson, 10 M. & W. 161, §§ 537, 540.
v. Laverty, 6 Munf. 487, § 972.
v. Rogers, 40 Ill. 278, §§ 957, 973, 1017.
v. Scott, 29 Ga. 392, §§ 1199, 1200.
v. Sharpe, 14 Allen, 43, § 611.
v. Sharpe, 103 Mass. 154, § 640.
v. Smallwood, Amb. 676, § 348.
v. Stetson, 14 Ohio St. 89, § 911.
v. Transp. Co. 3 Wall. 150, § 553.
v. Tunstall, 3 How. (Miss.) 259, § 907.
Wall *v.* Bry, 1 La. An. 312, § 935.
Wallace *v.* Agry, 4 Mason, 336, § 822.
v. Moody, 26 Cal. 387, § 127.
Wallen *v.* Huff, 3 Sneed, 82, § 343.
Wallis *v.* Rhea, 10 Ala. 451, § 231.
Walls *v.* Bailey, 49 N. Y. 464, § 480*o*.
Walsh *v.* Boyle, 30 Md. 267, § 96.
v. Frank, 19 Ark. 270, § 480*n*.
v. Miss. Trans. Co. 52 Mo. 434, § 480*n*.
Walter *v.* Haynes, Ry. & Mood. 149, § 924.
v. Maunde, 1 J. & W. 181, § 46.
Walters *v.* Brown, 15 Md. 285, §§ 870, 873.
v. Monroe, 17 Md. 154, §§ 943, 963.
v. Wash. Ins. Co. 1 Ia. 404, § 434.
Walwyn *v.* St. Quintin, 1 Bos. & P. 654, §§ 1001, 1004.
Walz *v.* Alback, 37 Md. 404, § 87.
Wanzer *v.* Carr, 76 N. Y. 526, § 431.
v. Howland, 10 Wis. 8, § 1371.
Ward *v.* Henry, 19 Wis. 76, § 1412.
v. Ward, 5 Conn. 595, § 418.
v. Morrison, 25 Vt. 593, § 436.
v. Smith, 7 Wall. 447, § 748.
Wardell *v.* Howell, 9 Wend. 170, § 94*b*.
Warder *v.* Tucker, 7 Mass. 449, §§ 237, 238, 975, 1017.
Wardin *v.* Adams, 15 Mass. 233, § 237.
Ward's Ex'rs *v.* Hague, 25 N. J. Eq. 397, § 203.
Wardwell *v.* Haight, 3 Barb. 549, §§ 518, 519.
Ware *v.* Lord Egmont, 4 De G. M. & G. 460, §§ 11, 42.
Wark *v.* Willard, 13 N. H. 389, §§ 214, 216.
Warner *v.* Whittaker, 6 Mich. 133, § 96.

Warnock *v.* Wightman, 1 Brev. 339, § 201.
Warren *v.* Ball, 37 Ill. 76, §§ 490, 492.
v. Copelin, 4 Metc. 594, § 436.
v. French, 6 Allen, 317, § 527.
v. Richmond, 53 Ill. 52, § 273.
v. Sweet, 31 N. H. 332, §§ 17, 279.
Warrington *v.* Furbor, 8 East, 242, § 991.
Warwick *v.* Warwick, 3 Atk. 291, §§ 674, 688.
Washburn *v.* Goodman, 17 Pick. 519, § 496.
Washburne *v.* Burnham, 63 N. Y. 301, §§ 119, 123.
Washington *v.* Pratt, 8 Wheat. 681, § 1109.
Washington Bank *v.* Lewis, 22 Pick. 24, §§ 683, 683*a*.
Wason *v.* Wareing, 15 Beav. 151, §§ 13, 30.
Watkins *v.* Crouch, 5 Leigh, 522, §§ 946, 949.
v. Edwards, 23 Tex. 443, § 277.
Watkinson *v.* Bank of Penn. 4 Whart. 482, §§ 506, 519.
Watlington *v.* Howley, 1 Desau. 167, § 370.
Watson *v.* Beabout, 18 Ind. 281, §§ 420, 422.
v. Hurt, 6 Gratt. 633, § 87.
v. King, 4 Camp. 272, § 671.
v. Mercer, 8 Pet. 88, § 127.
v. Phelps, 40 Ga. 482, §§ 48, 316.
v. Walker, 23 N. H. 471, §§ 1387, 1400.
v. Wells, 5 Conn. 468, §§ 674, 684.
v. Wilcox, 39 Wis. 643, § 369.
v. Wilson, 2 Dana, 406, § 357.
Way's Trusts, *In re*, 2 De G. J. & S. 365, § 430.
Weakly *v.* Bell, 9 Watts, 273, § 900.
Weatherwax *v.* Paine, 2 Mich. 555, § 87.
Weaver *v.* Borden, 49 N. Y. 286, § 93.
v. Crocker, 49 Ill. 461, § 1265.
Webb *v.* Dickenson, 11 Wend. 6, § 402.
v. Wilcher, 33 Ga. 565, § 219.
Webber *v.* Cox, 6 Monr. 110, § 1087.
v. Taylor, 2 Jones Eq. 9, § 278.
Webster *v.* Madox, 62 Me. 256, §§ 299, 301, 305.
Webster *v.* Webster, 3 Swanst. 491, § 496.
v. Van Steenburgh, 46 Barb. 211, § 97.
Weed *v.* Pierce, 9 Cow. 722, §§ 342*a*, 353.
Weeks *v.* Tomes, 16 Hun, 349, § 348.
Weidler *v.* Farmers' Bank of Lancaster, 11 S. & R. 134, § 42.
Weil *v.* Lowenthal, 10 Ia. 575, § 1352.
Weise *v.* Barker, 2 Pac. Rep. (Colo.) 919, § 152.
Weisser *v.* Dennison, 10 N. Y. 68, § 674.
Weit *v.* Thayer, 118 Mass. 473, § 80.
Wells *v.* Archer, 11 S. R. 412, § 438.
v. Child, 12 Allen, 330, § 1131.
v. Jackson, etc. Co. 47 N. H. 285, § 1412.
Welsh *v.* Gould, 2 Root, 287, § 113.
v. Kirkpatrick, 30 Cal. 202, § 1318.
v. Pittsburg, etc. R. Co. 10 Ohio St. 65, § 555.
Welton *v.* Garilardi, 6 Cal. 245, § 1322.
Wemple *v.* Dangerfield, 2 Sm. & M. 445, § 805.
Wendall *v.* North, 24 Wis. 223, § 480*c*.
v. Wadsworth, 20 Johns. 658, § 103.
West *v.* Brown, 6 Ohio St. 542, §§ 805, 808.
v. Reid, 2 Ha. 249, §§ 11, 34.
West Branch Bank *v.* Fulmer, 3 Pa. St. 399, § 1021.
West J. R. R. Co. *v.* Trenton Car Co. 32 N. J. L. 515, § 72.
Westbrook *v.* Gleason, 79 N. Y. 23, § 96.
Westcott *v.* Fargo, 63 Barb. 353, § 553.
Western Tr. Co. *v.* Marshall, 37 Barb. 509, §§ 67, 71.
Western Bank *v.* Sherwood, 29 Barb. 383, § 431.
Westervelt *v.* Haff, 2 Sandf. Ch. 98, § 672.
Westfield *v.* Mayo, 122 Mass. 100, § 480*m*.
Westoby *v.* Day, 22 Eng. L. & Eq. 261, § 1160.
Wetherbee *v.* Dunn, 32 Cal. 106, § 1413.
Weymouth *v.* Wash. etc. R. Co. 1 MacArthur, 19, § 1302.

Whalley *v.* Small, 25 Ia. 184, § 167.
Wharton *v.* Wright, 1 Carr. & Kir. 585, § 905.
Wheaton *v.* Dyer, 15 Conn. 307, § 113.
Wheeler *v.* Webster, 1 E. D. Smith, 1, § 1414.
Whitbread *v.* Jordan, 1 You. & Coll. Exch. 303, §§ 11, 246, 249.
White *v.* Carpenter, 2 Paige, 217, §§ 316, 341.
v. County, 58 Ill. 297; 11 Am. Rep. 652, § 480*g*.
v. Denman, 1 Ohio St. 110, §§ 112, 139, 231*a*.
v. Foster, 102 Mass. 375, §§ 14, 244, 308.
v. Hampton, 13 Ia. 259, § 168.
v. King, 53 Ala. 162, § 679.
v. Murphy, 3 Rich. L. 369, § 519.
v. Patten, 24 Pick. 324, §§ 214, 216.
v. Perry, 14 W. Va. 66, § 374.
v. Stoddard, 11 Gray, 258, §§ 724, 993.
v. Sydenstricker, 6 W. Va. 46, § 1381.
v. Wakefield, 7 Sim. 401, §§ 65*a*, 297, 299, 303.
v. Welsh, 38 Pa. St. 396, § 463.
v. Williams, 13 Tex. 258, § 480*e*.
Whiteacre *v.* Symonds, 10 East, 13, § 650.
Whitehead *v.* Anderson, 9 M. & W. 518, §§ 462, 464, 470, 480.
v. Clifford, 5 Taunt. 518, § 642.
v. Tuckett, 15 East, 400, § 653.
v. Wells, 29 Ark. 99, § 673.
Whitelock *v.* Castro, 22 Tex. 108, § 1410.
Whitesell *v.* Crane, 8 W. & S. 369, § 480*n*.
Whitesides *v.* Poole, 9 Rich. L. 68, § 1405.
Whitfield *v.* Faussett, 1 Ves. Sr. 387, § 11.
Whitlesey *v.* Dean, 2 Ark. 263, § 794.
Whitman *v.* Farmers' Bank, 8 Port. (Ala.) 258, §§ 717, 798.
Whitney *v.* Abbot, 5 N. H. 378, § 941.
v. Groot, 24 Wend. 82, § 402.
Whittington *v.* Wright, 9 Ga. 23, § 207.
Whitwell *v.* Johnson, 17 Mass. 449, §§ 794, 815, 822.
v. Vincent, 4 Pick. 449, § 72.
Wickersham *v.* Chicago, etc. Co. 18 Kan. 487, § 96.
Wickes *v.* Lake, 25 Wis. 71, §§ 273, 284, 288, 290.
Wickliffe *v.* Breckenridge, 1 Bush, 427, §§ 342*a*, 348.
Wicks *v.* Hatch, 62 N. Y. 535, § 662.
Wiggins Ferry Co. *v.* Chic. R. Co. 5 Mo. App. 374, § 1417.
Wilbraham *v.* Livesy, 18 Beav. 206, §§ 281, 303.
Wilcox *v.* Hill, 11 Mich. 256, § 96.
v. McNutt, 2 How. (Miss.) 776, § 845.
v. Routh, 9 Sm. & M. 476, §§ 744, 750.
Wilcoxen *v.* Miller, 49 Cal. 193, § 96.
Wilde *v.* Gibson, 1 H. of L. Cas. 605, § 37.
v. Wilde, 2 Nev. 306, § 1190.
Wilder *v.* Brooks, 10 Minn. 50, §§ 113, 118.
Wildes *v.* Savage, 1 Story, 22, §§ 395, 401.
Wiley *v.* Knight, 27 Ala. 336, §§ 687, 689.
Wilkes *v.* Jacks, Peak, 267, § 1017.
Wilkins *v.* Commercial Bank, 6 How. (Miss.) 217, §§ 743, 745, 746.
Wilkinson *v.* Hall, 3 Bing. N. Cas. 508, § 585.
Will *v.* Whitney, 15 Ind. 194, § 1159.
Willard *v.* Buckingham, 36 Conn. 395, §§ 675, 690.
Willes *v.* Greenhill, 4 De G. F. & J. 147, §§ 679, 681, 694.
William H. Northrup, The, Blatch. Pr. Cas. 235, § 1417.
Williams *v.* Adams, 43 Ga. 407, § 225.
v. Bank of United States, 2 Pet. 96, §§ 736, 786, 831, 844.
v. Banks, 11 Md. 198, §§ 118, 225.
v. Beard, 1 S. C. 309, § 101.
v. Benton, 12 La. An. 91, § 1257.
v. Brobst, 10 Watts, 111, § 1023.
v. Deriar, 31 Mo. 13, § 595.
v. Empire Ins. Co. 6 Rep. 673, § 1307.
v. Granger, 4 Day, 444, §§ 418, 1389.
v. Jones, 1 Bush, 621, § 642.
v. Logan, 32 Ga. 165, § 225.
v. Matthews, 3 Cow. 252, §§ 740, 1397.

Williams *v.* Miller, 1 Wash. Ter. 105, § 1186.
v. Niagara F. Ins. Co. 50 Ia. 561, § 480*n*.
v. Peyton, 4 Wheat. 77, § 1106.
v. Smith, 2 B. & Ald. 496, §§ 805, 824.
v. Sprigg, 6 Ohio St. 585, §§ 281, 288, 294.
v. Springs, 7 Ired. 384, § 1389.
v. State, 67 Ga. 260, § 1411.
v. State, 64 Ind. 553, § 1411.
v. Tatnall, 29 Ill. 553, §§ 687, 689.
Williamson *v.* Brown, 15 N. Y. 354, §§ 8, 11, 30, 246, 249.
v. Wardlaw, 40 Ga. 702, § 1150.
Willis *v.* Green, 5 Hill, 232, §§ 758, 761.
v. Vallett, 4 Metc. (Ky.) 186, § 694.
Willison *v.* Pattison, 7 Taunt. 439, § 980.
Wilson *v.* Anderton, 1 B. & Ald. 450, § 471.
v. Basket, 47 Miss. 637, § 1355.
v. Cockrill, 8 Mo. 7, § 1405.
v. Conway F. Ins. Co. 41 R. I. 141, § 674.
v. Hamilton, 4 Ohio St. 722, § 538.
v. Hart, 2 H. & M. 551; L. R. 1 Ch. 463, §§ 30, 65*a*. 286.
v. Hunter, 30 Ind. 466, §§ 64, 244, 246.
v. Johnson, 30 Tex. 499, § 1137.
v. Ladd, 49 Me. 73, § 1031.
v. McCullough, 23 Pa. St. 440, §§ 7, 11, 29.
v. School Dist. No. 4, 32 N. H. 118, § 1390.
v. Senier, 14 Wis. 380, §§ 745, 908, 946, 995.
v. Short, 6 Hare, 366, § 35.
v. Swaby, 1 Stark. 34, § 703.
v. Wall, 6 Wall. 83, § 11.
Wilty *v.* Hightower, 6 Sm. & M. 345, §§ 44, 278.
Wimberly *v.* Collier, 32 Ga. 13, § 480*c*.
Winborn *v.* Garrell, 3 Ired. Eq. 117, §§ 357, 375.
Winchester *v.* Balt. R. Co. 4 Md. 231, §§ 683*a*, 688, 690.
Windham Bank *v.* Norton, 22 Conn. 213, §§ 978, 1397.
Winnipisseogee Lake Co. *v.* Younge, 40 N. H. 420, §§ 1408, 1410.
Winston *v.* Taylor, 28 Mo. 82, § 1084.
v. Westfeldt, 22 Ala. 760. §§ 369, 372.
Winter *v.* Landphere, 42 Ia. 471, § 177.
v. Lord Anson, 1 S. & S. 434; S. C. 3 Russ. 488, § 689.
Winthrop *v.* Farrar, 11 Allen, 398, § 1297.
Wirtz *v.* Henry, 59 Ill. 109, § 1355.
Wise *v.* Wise, 2 Jones & L. 403, § 437.
Wiseman *v.* Hutchinson, 20 Ind. 40, § 307.
v. Westland, 1 Young & J. 117, § 105.
Wisenberg *v.* City of Appleton, 26 Wis. 56; 7 Am. Rep. 39, § 480*g*.
Witczinski *v.* Everman, 51 Miss. 841, § 272.
Withers *v.* Jenkins, 6 Rich. (S. C.) 122, § 143*a*.
Withington *v.* Herring, 5 Bing. 442, § 656.
Witman *v.* Watry, 31 Wis. 638, § 643.
Wittenbrock *v.* Bellmer, 62 Cal. 558, §§ 1202, 1209, 1217.
Witter *v.* Dudley, 42 Ala. 616, §§ 65*a*, 307.
Wolf *v.* Chalker, 31 Conn. 121, § 480*i*.
Wolfe *v.* Horton, 3 Cai. 86, § 1177.
Wollenweber *v.* Ketterlinus, 17 Pa. St. 389, § 1007.
Wood *v.* Blanchard, 19 Ill. 38, § 1126.
v. Chapin, 13 N. Y. 509, § 97.
v. Crocker, 18 Wis. 345, §§ 569. 570.
v. Fitz, 10 Mart. (O. S.) 196, § 1413.
v. Fowler, 26 Kan. 682; 40 Am. Rep. 330, § 1410.
v. Hickok, 2 Wend. 501, § 480*o*.
v. Krebbs, 30 Gratt. 708, §§ 65*a*, 307.
v. Partridge, 11 Mass. 488, § 426.
v. Warren, 82 N. Y. 265, § 672.
v. Wood, 16 N. Y. 428, § 759.
v. Yeatman, 15 B. Mon. 270, § 462.
Woodbridge *v.* Perkins, 3 Day, 364, § 436.
Woodcock *v.* Houldsworth, 16 M. & W. 124, § 821.
Woodliffe *v.* Connor, 45 Miss. 552, § 1368.

Woodman *v.* Thurston, 8 Cush. 157, § 936.
Woodrow *v.* O'Connor, 28 Vt. 776, § 1405.
Woods *v.* Boots, 60 Mo. 546, § 659.
v. Devin, 13 Ill. 746, § 454.
v. Farmere, 7 Watts, 382, §§ 7, 29, 273, 294, 297, 298, 300.
v. Monroe, 17 Mich. 238, § 1128.
v. Neeld, 44 Pa. St. 86, § 919.
v. Sherman, 71 Pa. St. 100, §§ 417, 421, 422.
v. Wilder, 43 N. Y. 164, § 983.
v. Woods, 127 Mass. 141, § 87.
Woodson *v.* Eastman, 10 N. H. 359, § 956.
Woodthorpe *v.* Lawes, 2 M. & W. 109, §§ 697, 720.
Woodward *v.* Chic. etc. R. Co. 21 Wis. 309, § 1411.
v. Foster, 18 Gratt. 213, § 87.
Woodworth *v.* Guzman, 1 Cal. 203, § 97.
v. Paige, 5 Ohio St. 70, §§ 11, 29.
Woolfolk *v.* Bank of America, 10 Bush, 594, §§ 80, 86.
Wooster *v.* Sherwood, 25 N. Y. 278, §§ 67, 69.
Worcester Bank *v.* Cheney, 94 Ill. 430, § 1411.
v. Dorchester Bank, 10 Cush. 488, § 80.
Worden *v.* Nourse, 36 Vt. 775, § 714.
Work *v.* Harper, 24 Miss. 517, §§ 112, 125.
Workingmen's Bank *v.* Converse, 33 La. An. 963, § 1408.
Wormald *v.* Maitland, 35 L. J. Ch. (N. S.) 69, § 246.
Wormley *v.* Wormley, 8 Wheat. 421, §§ 15, 308.
Worsley *v.* Earl of Scarborough, 3 Atk. 392, §§ 263, 338, 348, 375.
Worthington *v.* Morgan, 16 Sim. 547, §§ 47, 65*a*.
Wright *v.* Bates, 13 Vt. 341, § 299.
v. Caldwell, 3 Mich. 51, § 454.
v. Dunham, 13 Mich. 414, § 1411.
v. Hawkins, 28 Tex. 452, § 1404.
v. Marsh, 2 G. Greene, 109, § 1160.
v. Simpson, 6 Ves. Jr. 714, § 418.
v. Whiting, 40 Barb. 240, § 480*m*.
Wright *v.* Wood, 23 Pa. St. 120, §§ 285, 287, 290, 294.
Wright's Mortgage Trust, 16 Eq. Cas. 41, § 111.
Wyatt *v.* Barwell, 19 Ves. 435, § 108, 161.
v. Elam, 19 Ga. 335, § 225.
v. Stewart, 34 Ala. 716, § 231.
Wyld *v.* Pickford, 8 M. & W. 443, §§ 542, 558.
Wynn *v.* Brooke, 5 Rawle, 106, § 480*m*.
Wythes *v.* Labouchere, 2 De G. & J. 593, § 674.

Y.

Yancy *v.* Brown, 3 Sneed, 89, § 401.
Yeager *v.* Farwell, 13 Wall. 6, § 938.
Yeatman *v.* Erwin, 5 La. 264, § 899.
Yoder *v.* Swope, 3 Bibb, 204, § 48.
York *v.* Crawford, 42 Miss. 508, § 1374.
York Co. *v.* Cent. R. Co. 3 Wall. 107, § 553.
Young *v.* Commissioner, etc. 2 Nott & McC. 537, § 480*g*.
v. Durgin, 15 Gray, 264, § 855.
v. Mackall, 4 Md. 362, § 1247.
v. Smith, 28 Mo. 65, § 592.
v. Tibbitts, 32 Wis. 79, §§ 499, 507.
v. Wilson, 27 N. Y. 351, §§ 149, 180.
Youngblood *v.* Vastine, 46 Mo. 239, §§ 217, 222.
Younghause *v.* Fingar, 63 Barb. 299; 47 N. Y. 99, § 1213.
Youngs *v.* Lee, 12 N. Y. 551, § 837.
v. Ransom, 31 Barb. 49, § 1408.
Yount *v.* Howell, 14 Cal. 465, § 1413.
Yrisarri *v.* Clement, 3 Bing. 438, § 1414.

Z.

Zacharie *v.* Bowers, 3 Sm. & M. 641, § 1031.
Zeigler *v.* Shomo, 78 Pa. St. 357, § 124.
Zollar *v.* Janvrin, 47 N. H. 324, § 483.
Zouch *v.* Willingale, 1 H. Blackst. 311, § 648.

THE LAW OF NOTICE.

CHAPTER I.

THE DIFFERENT KINDS OF NOTICE.

I. Actual Notice.
II. Constructive Notice.

I. Actual Notice.

§ 1. Conflict of Authority as to What is Actual Notice.
2. Causes of the Apparent Conflict.
3. Distinction between Knowledge and Notice.
4. Same, with Illustration.
5. Different Kinds of Actual Notice.
6. Express Notice.
7. Direct Information.
8. Notice by Implication.
9. Disregard of Notice Amounting to Fraud.
10. Circumstances Sufficient to Put Upon Inquiry.
11. Knowledge Imputed to One Who Has the Means of Knowing.
12. Notice to Purchasers — When Actual.
13. Facts Sufficient to Excite Inquiry.
14. Possession Insufficient.
15. Title Papers.
16. Possession Held Sufficient.
17. Purchaser to Use Diligence.
18. Purchaser of Equitable Interest.
19. Vendor's Lien.
20. Purchaser from Mortgagor.
21. Notice of Trust.
22. Purchaser from Insolvent Trustee.
23. Suspicious Circumstances.
24. Inadequacy of Price.
25. Relationship between the Parties.
26. Notice of Partnership Interest.
27. Information Sufficient to Put Upon Inquiry.
28. Different Sources of Information.

§ 29. Vague Statements Disregarded.
30. Degree of Certainty Required.
31. Notice to an Agent.
32. Principal not Benefited by Agent's Fraud.
33. How Principal Affected by Notice to Agent.
34. Purchase after Fruitless Inquiry.
35. Information Allaying Suspicion.
36. The Effect of Reliance on Information from Doubtful Sources.
36*a*. A Practical View of the Distinction between Actual and Constructive Notice.

§ 1. Conflict of Authority as to What is Actual Notice.— The term here used to designate that branch of the law of notice which does not rest upon mere legal inference or presumption, and to distinguish it from what is properly called *constructive notice*, would seem to be sufficiently definitive of its own meaning to pass without further gloss or comment. On its face, it would appear to import its character so clearly and unmistakably, as not to depend for elucidation upon judicial construction. And yet the decisions upon this question are far from harmonious, even in this country, and the contrariety of view between the courts of Great Britain and the United States is equally perplexing and unsatisfactory.

§ 2. Causes of the Apparent Conflict.— The conflict of authority is more apparent, however, than real. A careful examination of some of the cases, in which the most contradictory methods of classifying the kinds of notice are considered, discloses the fact that much of the confusion arises from attempts to give general definitions which shall embrace just sufficient to be applicable to the cases decided, in the same manner as they are applied to precedent cases where the same principles are involved. A term incapable of being disposed of in a brief definition may be thus loosely explained and convey a meaning sufficiently clear and distinct for the purposes of the case; but when there is an attempt to apply the definition thus hastily constructed to other cases, it may express too much, or too little.

§ 3. **Distinction Between Knowledge and Notice.**— Actual notice has been defined by declaring that it exists "when knowledge is actually brought home to the party to be affected by it."[1] This excludes all notice which does not amount in fact, as well as theory, to *actual knowledge*. There can be no doubt that this definition is too narrow. If we are to be confined strictly to what would be considered in metaphysics as actual knowledge, it will be necessary to banish the term from our statutes, and the courts will be compelled to abandon it as unfit for judicial use. Scarcely any fact can be communicated in a manner so direct as to exclude every possibility of doubt as to its authenticity. Absolute knowledge, in the strict sense of the term, imports so high a degree of certainty as to the matter to be established, that to require it in every instance would render the adjustment of differences between man and man, on any just basis, practically impossible. Courts must at best be content with such an approximation to perfect knowledge as the natural imperfections of human recollection will afford. And if this term, like all others employed to express the intention of legislative bodies, is to be subjected to judicial construction, there seems no good reason why it should not be construed in harmony with the whole body of the law, and so as to effectuate the purposes for which laws are intended.[2]

§ 4. **Same, with Illustration.**— The courts have accordingly refused to confine actual notice within the narrow limits of the definition quoted above. Their departure from the rule that renders *actual notice* and *actual knowledge* synonymous terms, is perhaps most conspicuous in cases arising under the registry laws, where, in order to give pre-

[1] Bouv. Law Dict., 236; Story, Eq. Jur., § 399.

[2] As to what is knowledge, see Lloyd *v.* Banks, L. R., 3 Ch., 488–90; Johns *v.* Scott, 5 Md., 81; Brown *v.* Wells, 44 Ga., 573–5; Jones *v.* Lapham, 15 Kans., 540–46; Virgin *v.* Wingfield, 54 Ga., 451–4; Blatchley *v.* Osborn, 33 Conn., 226–33; Lawton *v.* Gordon, 37 Cal., 202–6; McKinney *v.* Brights, 16 Pa. St., 399.

cedence to a prior unrecorded instrument, over a subsequent one affecting the same land, which has been duly recorded, it is necessary to prove that the subsequent purchaser had actual notice of the prior unregistered instrument. To follow the strict letter of Bouvier's definition, and bring actual knowledge home to the subsequent purchaser, nothing would suffice less certain than the presence of the party to be affected when the prior instrument was executed, and a careful inspection thereof by him with sufficient knowledge of the premises described to enable him to identify the property conveyed, as that of which he subsequently becomes the purchaser. And even this might fail to fix him with actual knowledge at the time of the subsequent purchase. There would be nothing to prevent his interposing, as an excuse, his inability to understand the import of the prior deed, or from declaring that the first transaction had passed out of his recollection when the second took place. This would leave the question of knowledge, after all, to be determined by the evidence. The main fact would depend upon inference to be drawn from collateral circumstances. But where one purchased a piece of land of which there was a former conveyance, the registration of which was absolutely void on account of the absence of the necessary certificates to the acknowledgment, and the subsequent purchaser was informed by his attorney, employed to investigate the title, that such void registry had been made, it was held that this information was sufficient to put him upon inquiry, and, taken in connection with other collateral circumstances of a less significant character, would warrant the conclusion that the subsequent purchaser had actual notice of the prior deed.[1] This was several removes from actual knowledge.

§ 5. **Different Kinds of Actual Notice.**— There are two classes of actual notice, which for convenience may be designated as, 1. *Express*, which includes all knowledge or information coming to the party to be charged, of a degree

[1] Musgrove *v.* Bonser, 5 Oreg., 313; Hastings *v.* Cutler, 24 N. H., 481.

above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry; and 2. *Implied*, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest.

§ 6. **Express Notice.**—The first of these classes is easily and briefly disposed of. Not only would it embrace what might fairly be called knowledge, from the fact that it was derived from the highest evidence to be communicated by the human senses; but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated.

§ 7. **Direct Information.**—It has been decided in several cases where the information came from those whose means of knowledge were of an inferior sort, that this notice, to effectually bind subsequent purchasers, must come from parties in interest;[1] and in other cases it is decided that the statements of third parties who are ignorant of the facts will not amount to notice.[2] But it has been held, in a case in which the inadequacy of the vague and uncertain conjectures of those unacquainted with the facts is fully recognized, that where the communication comes from those who speak advisedly of the matter, or from information in their possession, of a definite character, the notice will be

[1] Rogers *v.* Hoskins, 14 Ga., 166; Miller *v.* Cresson, 5 Watts & Serg., 284; Woods *v.* Farmere, 7 Watts, 382; Sug. on Vend., 755, and cases cited; Barnhardt *v.* Greenshields, 9 Moo. P. C. C., 18; Jay *v.* Richardson, 30 Beav., 563; Greenslade *v.* Dare, 20 Beav., 284; Central R'y Co. of Venezuela *v.* Kisch, 2 L. R. App. Ca., 112; Hamilton *v.* Royse, 2 Sch. & Lef., 315.

[2] Butler *v.* Stevens, 26 Me., 484; Wilson *v.* McCullough, 11 Harris, 440; City Council *v.* Page, 1 Speers' Eq., 159; Lamont *v.* Stimson, 5 Wis., 443.

sufficient to affect the conscience of the purchaser.[1] In some of the cases cited, however, the notice obtained by information is regarded as of that character which has the effect of putting the purchaser upon inquiry. But when the information comes directly from the party in possession of full knowledge of the facts communicated, and is so full and complete as to all the essential details of the matter as to carry conviction to an ordinary mind, it would properly be classed as express notice, though it stopped far short of what might be correctly termed absolute knowledge.[2]

§ 8. **Notice by Implication.**— Implied notice includes neither positive knowledge, nor information so direct and unequivocal as necessarily to carry conviction to the mind of the person notified. Neither does it belong to that class which depends upon legal presumption. It is circumstantial evidence, from which the jury, after estimating its value, may infer notice. It differs from express notice for the reason that the latter is supposed to be absolutely convincing in itself, while the former merely suggests to the mind of the person to be thereby affected, the existence of the fact to which his attention is directed, and points out the means by which he may obtain positive and convincing information.[3] It differs, on the other hand, from *constructive* notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the infer-

[1] Jackson *v.* Burgott, 10 Johns., 457; Pearson *v.* Daniel, 2 Dev. & Bat. Eq., 366; Doyle *v.* Teas, 4 Scam., 202; Mulliken *v.* Graham, 72 Pa. St., 484; Curtis *v.* Mundy, 3 Metc., 407; Cox *v.* Milner, 23 Ill., 476; Rupert *v.* Mark, 15 id., 542; Ibbotson *v.* Rhodes, 2 Vern., 554; Pearson *v.* Morgan, 2 Bro. Ch., 353; Bridge *v.* Beadon, L. R., 3 Eq., 664; Lee *v.* Howlett, 2 K. & J., 531; Burrowes *v.* Locke, 10 Ves., 470; Slim *v.* Croucher, 1 De G., F. & J., 518; Barry *v.* Croskey, 2 J. & H., 21.

[2] Musgrove *v.* Bonser, 5 Oreg., 313; Hastings *v.* Cutler, 24 N. H., 481; Barnes *v.* McClinton, 3 Pa., 67.

[3] Farnsworth *v.* Childs, 4 Mass., 637; Roberts *v.* Anderson, 3 Johns. Ch., 371; Pitney *v.* Leonard, 1 Paige, 461; Bingamore *v.* Hyatt, 1 Smed & Mar. Ch., 437.

ence upon which it rests; constructive notice being the creature of positive law, or resting upon strictly *legal* inference,[1] while implied notice arises from inference of *fact*.[2]

§ 9. **Disregard of Notice Amounting to Fraud.**—An example of these distinctions, as drawn by the courts, is furnished by the holding in a case between a party claiming under a prior unregistered deed and one claiming under a subsequent registered conveyance,[3] similar to that already cited.[4] There the court decided, under a statute requiring actual notice to charge subsequent parties with notice of prior unrecorded instruments or equitable claims, that the party claiming under the unrecorded deed was not required to prove that the subsequent purchaser had certain knowledge of the prior conveyance, such as he would have if he had seen the first deed executed and delivered to the grantee. It was held that something less than positive personal knowledge of the fact of the conveyance would be sufficient to constitute "actual notice," within the true intent and meaning of the statute. The test of sufficiency applied to the notice in this case was that it "should be so express and satisfactory to the party as that it would be fraud in him subsequently to purchase, attach or levy upon the land, to the prejudice of the first grantee."

§ 10. **Circumstances Sufficient to Put Upon Inquiry.**—Where the matter of which express notice is proved is merely a circumstance collateral to the main fact with notice of which it is sought to charge the party, the col-

[1] Plumb *v.* Fluitt, 2 Anstr., 432; Davis *v.* Bigler, 62 Pa. St., 241; Lasselle *v.* Burnett, 1 Blackf., 150; Cotton *v.* Hart, 1 A. K. Marsh., 56; Hinde *v.* Vattier, 1 McLean, 110.

[2] Williamson *v.* Brown, 15 N. Y., 354; Heermans *v.* Ellsworth, 64 N. Y., 159; Hoyt *v.* Sheldon, 3 Bosw., 267; Massie *v.* Greenhow, 2 Pat. & Heath., 255. Mere notice of execution of deed not notice of contents. Mocatta *v.* Murgatroyd, 1 P. Wms., 393; Beckett *v.* Cardley, 1 Bro. Ch., 353; Rancliffe *v.* Parkyns, 6 Dow., 149; Lloyd *v.* Banks, L. R., 3 Ch., 488, 490.

[3] Curtis *v.* Mundy, 3 Metc., 405.

[4] *Ante*, § 4, note.

lateral circumstance, if sufficient to put him upon inquiry leading to the truth, will, in general, be regarded as good notice of the ultimate fact to be established.[1] All the cases, however, where this doctrine is maintained do not go the length of holding that facts and circumstances sufficient to put the party to be affected upon inquiry would amount to actual notice of such fact; nor even evidence from which the jury might infer positive knowledge or express notice; but that it would amount to *constructive notice;* while others declare quite plainly that proof of such circumstances warrants the inference of *actual notice.*[2] This difference does not necessarily indicate a conflict between the authorities, but merely shows that the same circumstances from which the jury might infer, as matter of fact, that express notice had been given, would serve as a foundation for the legal presumption which the party to be charged would not be

[1] McDonald *v.* Gaunt, 2 Pac. Rep., 871; Philips *v.* Reitz, 16 Kan., 396; Baker *v.* Bliss, 39 N. Y., 70; Green *v.* Slayter, 4 Johns. Ch., 38; McDaniels *v.* Flower Brook Manuf'g Co., 22 Vt., 274; McGehee *v.* Gindrat, 20 Ala., 95; Center *v.* P. & M. Bank, 22 Ala., 743; Maybin *v.* Kirby, 4 Rich. Eq., 105; Raritan Water Power Co. *v.* Veghte, 21 N. J. Eq., 463; Hoy *v.* Bramhall, 19 N. J. Eq., 563; Danforth *v.* Dart., 4 Duer, 101; Parker *v.* Kane, 4 Wis., 1; Sterry *v.* Arden, 1 John. Ch., 261; Tuttle *v.* Jackson, 6 Wend., 213; Peters *v.* Goodrich, 3 Conn., 146; Pendleton *v.* Fay, 2 Paige, 202; Blaisdell *v.* Stevens, 16 Vt., 179; Stafford *v.* Ballou, 17 Vt., 329; Vattier *v.* Hinde, 7 Pet., 252; Ringgold *v.* Waggoner, 14 Ark., 69; Swarthout *v.* Curtis, 5 N. Y., 301; Randall *v.* Silverthorne, 4 Penn. St., 173; Parke *v.* Chadwick, 8 W. & S., 96; Sergeant *v.* Ingersoll, 7 Penn. St., 340; S. C., 15 id., 343; Maitland *v.* Backhouse, 17 L. J. Ch., 121; Espy *v.* Lake, 10 Ha., 260; Dawson *v.* Prince, 2 D. & J., 41; Dettmar *v.* Metropolitan, etc., Bank, 1 H. & M., 641; Mangles *v.* Dixon, 3 H. L., 702; Owen *v.* Homan, 4 H. L., 997; Perry *v.* Holl, 2 De G., F. & J., 38; Broadbent *v.* Barlow, 3 De G., F. & J., 570.

[2] Hull *v.* Noble, 40 Me., 459; Buttrick *v.* Holden, 13 Met., 355; Buck *v.* Paine, 50 Miss., 648; Canton *v.* City of Portland, 4 Oreg., 339; Curtis *v.* Blair, 4 Cush., 309; Epley *v.* Witherow, 7 Watts, 163; Brinkman *v.* Jones, 44 Wis., 498; Lambert *v.* Newman, 56 Ala., 623; Helms *v.* Chadbourne, 45 Wis., 60; Shepardson *v.* Stevens, 71 Ill., 646; Reynolds *v.* Ruckman, 35 Mich., 80; Munroe *v.* Eastman, 31 Mich., 283; Eck *v.* Hatchers, 58 Mo., 235; Barker *v.* Foy, 43 Miss., 260; Wailes *v.* Cooper, 24 Miss., 208.

permitted to deny, where constructive notice would be effectual.[1]

§ 11. Knowledge Imputed to One Who Has the Means of Knowing.— It is easy to understand how one may be concluded from denying actual notice when positive information has been traced directly to him. It is not necessary to invoke the doctrine of constructive notice in order to justify holding that he will not be heard to deny that he understood the import of what was clearly and plainly communicated. Whether the notice has been communicated cannot be determined by the standard of the recipient's stupidity or heedlessness. For the reason, therefore, that ignorance of an important fact which has been placed within the easy reach of a party imports either fraud or gross negligence on his part, the law will never inquire further than is necessary to show the giving of the notice by such means as are sufficient to convey intelligence from one human being to another. It has accordingly been held that, "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making, such obvious inquiries, he must be taken to have notice of these facts, which, if he had used such ordinary diligence, he would readily have ascertained."[2]

[1] See *post*, § 37 *et seq.* For examples of circumstances held insufficient to put a purchaser upon inquiry, see Cathay *v.* Sydenham, 2 Brown, Ch., 391; Smith *v.* Reese River Co., L. R., 2 Eq., 264. In the latter case it is held that one relying upon statements of directors is not put upon inquiry by the statement that further information is to be had at the office of the company.

[2] Baron Alderson, in Whitbread *v.* Jordan, 1 You. & Coll. Exch., 303; Hankinson *v.* Barbour, 29 Ill., 80; Lewis *v.* Bradford, 10 Watts, 67; Williamson *v.* Brown, 15 N. Y., 354; Fiske *v.* Potter, 2 Keyes, 64; Oliver *v.* Piatt, 3 How., 333; Jenkins *v.* Eldridge, 3 Story, 181; Wilson *v.* Wall, 6 Wall., 83; Briggs *v.* Taylor, 28 Vt., 180; Woodworth *v.* Paige, 5 Ohio St., 70; Blaisdell *v.* Stevens, 16 Vt., 179; Booth *v.* Barnum, 9 Ct., 286; Jones *v.* Smith, 1 Ha., 43; West *v.* Reid, 2 Ha., 249; Owen *v.* Homan, 4 H. L., 997; Jones *v.* Williams, 24 Beav., 47; Tarrant *v.* Blanchard, 1

§ 12. **Implied Notice to Purchasers — When Actual.**— A familiar class of cases in which this doctrine is applied is that to which the examples already furnished belong, where the controversy lies between purchasers of the same piece of real estate, and the first purchaser holds under an unrecorded conveyance of which it is sought to charge the subsequent purchasers with notice.[1] In a case of this kind, arising under the provisions of a statute requiring actual notice of unrecorded instruments, in order to affect subsequent purchasers for value, and where the spreading of an instrument upon the records, which, for the want of certain formalities, was not entitled to be recorded, did not amount to constructive notice under the statute, it was held by Judge Bliss that, "If the deed was actually put upon record, although not so acknowledged that its record would be constructive notice, and if the party saw that record, it would be very strong, if not conclusive, evidence of the actual notice required by statute. The object of the registry act is to protect innocent purchasers, and no subsequent purchaser can be innocent who knew of a previous

De G., J. & S., 107; Mayor, etc., *v.* Murray, 7 De G., M. & G., 497; Gen'l Steam, etc., Co. *v.* Rolt, 6 C. B., N. S., 550.

The means of knowledge which will warrant the inference of notice must be such as could be rendered available by the exercise of ordinary prudence and diligence. The knowledge must be practically within the reach of a reasonable man. The person is not to be charged with notice for failure to exercise extreme or extraordinary caution. Lamont *v.* Stimson, 5 Wis., 443; Colquitt *v.* Thomas, 8 Ga., 258; Wilson *v.* McCullough, 23 Pa. St., 440; Hill *v.* Simpson, 7 Ves., 152; Ware *v.* Egmont, 4 De G., M. & G., 460; Greenslade *v.* Dare, 20 Beav., 284; Dodds *v.* Hills, 2 H. & M., 424; Stephenson *v.* Rosse, 5 Irish Ch., 401; Jackson *v.* Rowe, 2 Sim. & St., 472; Whitfield *v.* Faussett, 1 Ves. Sr., 387; Hine *v.* Dodd, 2 Atk., 275; Montefiore *v.* Browne, 7 H. L. Cas., 241; Tildesley *v.* Lodge, 3 Smale & G., 543. Nevertheless it has been frequently held that one contemplating a purchase of real estate, being put upon inquiry, is not exonerated by merely making an examination of the records, and finding no title in conflict with that of his grantor. Shotwell *v.* Harrison, 30 Mich., 179; Pringle *v.* Dunn, 37 Wis., 449; Brinkman *v.* Jones, 44 Wis., 498; Littleton *v.* Giddings, 47 Tex., 109; *post*, § 270.

[1] *Ante*, §§ 4, 9.

conveyance, whether it be so acknowledged as to authorize its record or not. And it would be absurd to say that an exhibition to him of a copy of such conveyance, made under circumstances that would presume it to be a genuine copy, would be no evidence of such notice."[1] The learned judge would probably have gone further, had the case required it, and laid down the doctrine that one who had seen a copy of the prior deed, under such circumstances, would be in possession of such notice as to render fraudulent a subsequent purchase by him of the property thereby conveyed.

§ 13. Sufficiency of Certain Facts to Excite Inquiry.— There is a decided conflict of authority, both English and American, concerning some particular facts, whether they are sufficient to put a purchaser upon inquiry, so as to charge him with knowledge of a prior conveyance. This conflict cannot be reconciled, nor can anything like a general rule be deduced therefrom, which would not be subject to a multitude of exceptions, for the reason that, in estimating the effect upon the conscience of the purchaser of particular circumstances brought to his knowledge prior to the purchase, there are doubtless many considerations, purely local in their character, which tend to affect the value of such circumstances as evidence of notice.[2]

Thus, on the purchase of one of two adjoining estates, both of which belonged to the same owner, it was held that the binding covenants entered into with the mortgagee of the estate not purchased would not give notice of the expenditures made on both.[3] So where the title deeds

[1] Musick *v.* Barney, 49 Mo., 458; Maupin *v.* Emmons, 47 id., 304, 306, 307: Pringle *v.* Dunn, 37 Wis., 449, 461, 464; Partridge *v.* Smith, 2 Biss., 183, 185, 186; Gilbert *v.* Jess, 31 Wis., 110; Hastings *v.* Cutler, 24 N. H., 481; Musgrove *v.* Bonser, 5 Oreg., 313. *Contra,* Kerns *v.* Swope, 2 Watts, 75.

[2] Lowry *v.* Brown, 1 Cold., 456; Doyle *v.* Teas, 5 Ill., 202; Colyer *v.* Finch, 5 H. L., 905; Herrick *v.* Attwood, 2 De G. & J., 21. A man specially directed to another for information is bound to inquire of such person. Wason *v.* Wareing, 15 Beav., 151.

[3] Harryman *v.* Collins, 18 Beav., 19.

to the premises were left in the possession of the vendor's solicitor, though the muniments of title are usually held by the owner, or one claiming a lien, possession under these circumstances was held not to give notice of any lien for which the deeds were held by the solicitor, as his possession was consistent with the rights of the vendor.[1] So also, the fact that one has witnessed the signature of a deed, was decided not to be notice to the witness of the contents of the instrument.[2] And though knowledge of a will is generally held to charge one with notice of the devises and bequests therein contained, it is decided that such knowledge is insufficient to impart notice of the particular estates of the testator, when the will devises all the estates generally.[3]

§ **14. Possession Insufficient.**— In Massachusetts, where the statute requires actual notice to charge purchasers, it is held that proof of open and notorious occupation and improvement would not be such evidence of ownership in the occupant as to make it the duty of any one cognizant of such facts to make further inquiry before purchasing.[4]

And in Lamb *v.* Pierce,[5] it is held not only that such open and notorious possession and improvement would not be sufficient, but the court goes further, and declares that proof of facts which would reasonably put a purchaser upon inquiry would not fulfil the statutory requirements. This, however, goes so far beyond the most recent authority cited in support of the doctrine therein declared,[6] that the case may be regarded as unsupported by authority even in that state, so far as it goes beyond excluding *possession* as evidence of notice.

[1] Bogan *v.* Williams, 3 Younge & J., 150.

[2] Mocatta *v.* Murgatroyd, 1 P. Wms., 393; Rancliffe *v.* Parkyns, 6 Dow., 149; Beckett *v.* Cardley, 1 Bro. Ch., 353.

[3] Rancliffe *v.* Parkyns, 6 Dow., 149.

[4] Pomroy *v.* Stevens, 11 Metc., 244; Parker *v.* Osgood, 3 Allen, 487; Dooley *v.* Wolcott, 4 Allen, 406; Sibley *v.* Leffingwell, 8 Allen, 584.

[5] 113 Mass., 72.

[6] White *v.* Foster, 102 Mass., 375.

§ 15. Title Papers.— The case of White *v.* Foster, referred to above,[1] was where there was an equitable claimant to an interest in real estate, who had not placed his claim within the protection of the registry laws. The reservation of this interest was mentioned in a mortgage, and the property subsequently conveyed to a purchaser who had no other notice of the interest reserved than the fact that it was mentioned in a mortgage subject to which he purchased. This was held to be actual notice, and the court, in construing the statute, declared that in order to show *actual notice* it was not necessary to prove an actual exhibition of the deed. This must be taken as an admission of the efficacy of facts which put one upon inquiry; for it cannot be contended that the subsequent purchaser in this instance was *expressly* notified of the outstanding equity, by the recitals in an instrument affecting his title, merely because he had notice of such instrument. The only ground upon which he could be charged with actual notice was that, having notice of the mortgage, ordinary prudence dictated that he should examine it with a view to gaining a knowledge of its contents.[2]

§ 16. Possession Held Sufficient Evidence of Actual Notice.— The statute of the state of Missouri provides that instruments affecting the title to real estate shall not be valid, except between the parties, and such as have *actual notice* thereof, until deposited with the recorder for

[1] *Supra*, § 14, n. 3.

[2] Wormley *v.* Wormley, 8 Wheat., 421; Oliver *v.* Piatt, 3 How., 333; Neale *v.* Hagthrop, 3 Bland., 551; Christmas *v.* Mitchell, 3 Ired. Eq., 535; Rogers *v.* Jones, 8 N. H., 264; Griffith *v.* Griffith, 1 Hoff. Ch., 153; Mason *v.* Paine, Walker's Ch., 453; Hackwith *v.* Damron, 1 Monr., 235; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Rutter *v.* Barr, 4 Ohio, 446; Gordon *v.* Sizer, 39 Miss., 805; Surman *v.* Barlow, 2 Edm., 167; Sheldon *v.* Cox, 2 Edm., 224; Taylor *v.* Baker, 5 Price, 306; Moore *v.* Bennett, 2 Ch. Cas., 246; Bath & Montague's Case, 3 Ch. Cas., 110; Palmer *v.* Wheeler, 2 Ball. & B., 18; Malpas *v.* Ackland, 3 Russ., 273; Roddy *v.* Williams, 3 Jones & L., 1; Hope *v.* Liddell, 21 Beav., 183; Cox *v.* Coventon, 31 Beav., 378; Steedman *v.* Poole, 16 L. J. Ch., 349; Clements *v.* Welles, L. R., 1 Eq., 200; Tanner *v.* Florence, 1 Ch. Cas., 259.

record.[1] This language of the statute is construed by the supreme court of that state to mean that any fact from which a jury may infer actual notice would be admissible in evidence to establish that fact. This species of notice is defined as being either knowledge, or consciousness of having the means of knowledge, although he may not use them;[2] and open, notorious possession, under claim of ownership, by the party holding adversely to the subsequent purchaser, is regarded as sufficient to place the means of knowledge within his reach, and from such possession the jury might infer that the subsequent purchase was made with either full knowledge or voluntary ignorance of the adverse claim.[3] The erection of visible structures upon land is sufficient to give notice of the right or claim of right under which such structures are erected, so far, at least, as to make it the duty of any one contemplating a purchase of the land to inquire concerning the claim.[4]

§ 17. **Purchasers to Use Diligence.**— In Cambridge Valley Bank *v.* Delano,[5] the doctrine of actual notice by implication from circumstances is very comprehensively and fully set forth, as between adverse claimants to real estate. The most conspicuous fact in this case was the recital in antecedent title papers of the grantor. It was there held that "where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it

[1] Wag. Stat., 277, § 26.

[2] Speck *v.* Riggin, 40 Mo., 405; Maupin *v.* Emmons, 47 Mo., 304; Roberts *v.* Mosley, 64 Mo., 507.

[3] Vaughan *v.* Tracy, 22 Mo., 415. See *post*, ch. IV; see, also, Parker *v.* Kane, 4 Wis., 1, where notorious acts of ownership are held to amount to notice. Reed *v.* Gannon, 50 N. Y., 345.

[4] Raritan, etc., Co. *v.* Veghte, 21 N. J. Eq., 463; Randall *v.* Silverthorne, 4 Pa. St., 173; Hoy *v.* Bramhall, 19 N. J. Eq., 563; Hervey *v.* Smith, 22 Beav., 299; Paul *v.* Connersville, etc., R. Co., 51 Ind., 527; *post*, § 273 *et seq.*

[5] 48 N. Y., 326.

is his duty to make the inquiry, and if he does not make it, he is guilty of bad faith or negligence to such an extent that the law will presume that he made it, and will charge him with the actual notice he would have received if he had made it." The same doctrine is also supported by numerous authorities in this and other states.[1]

§ 18. **Purchaser of Equitable Interest.**—Where one purchases, with notice of the fact that the legal title to the property is in some one else than his grantor, he is thereby put upon inquiry as to the nature and extent of his grantor's title, and if such inquiries would lead to knowledge of circumstances affecting the title, he will be bound as by actual notice of such facts.[2]

§ 19. **Vendor's Lien.**—So when the adverse claim is a vendor's lien for the unpaid purchase money, notice to the purchaser that the title passed without actual payment of the price agreed upon, although the deed contains an acknowledgment of full payment, will be sufficient to put him upon inquiry as to that fact, and failing to exercise reasonable diligence to ascertain whether there has been a subsequent payment, he will be charged with actual notice of what remains unpaid, and will hold the title subject to the prior lien.[3]

§ 20. **Purchaser from Mortgagee.**—So also the fact that a mortgage appears to have been discharged by a person other than the mortgagee has been held sufficient to excite inquiry as to the reason of the unusual circumstance, and the purchaser, with knowledge of such fact, would be bound

[1] Mayor, etc., *v.* Williams, 6 Md., 235; Price *v.* McDonald, 1 Md., 403; Leiman's Estate, 32 Md., 225; Blatchley *v.* Osborn, 33 Conn., 226; Nute *v.* Nute, 41 N. H., 60; Warren *v.* Sweet, 31 N. H., 332; Maupin *v.* Emmons, 47 Mo., 304; Nelson *v.* Sims, 1 Cush. (Miss.), 383: Russell *v.* Petree, 10 B. Mon., 184; Howard Ins. Co. *v.* Halsey, 4 Sandf., 565; S. C., 8 N. Y., 271; *supra*, § 11, note; *post*, § 307 *et seq.*

[2] Sergeant *v.* Ingersoll, 7 Penn. St., 340; S. C., 15 Penn. St., 343; Bishop, etc., *v.* A Copyholder, Freem. Ch., 137.

[3] Parke *v.* Chadwick, 8 W. & S., 96; Frail *v.* Ellis, 16 Beav., 350.

by knowledge of all such further facts, affecting the title to the property, as the inquiry would disclose.[1]

§ 21. **Notice of Trust.**—Where the purchaser had knowledge that the property had been purchased by persons who were executors of a will, and mentioned as such in one of the deeds forming a link in the chain of title, together with knowledge that such executors held in trust a large estate with unlimited authority to purchase real estate, this was held sufficient to charge the purchaser with notice of the fact that the property purchased was held subject to the trust, upon the principle that, being possessed of knowledge of distinct facts affecting the title of his contemplated purchase, he could not close his eyes and screen himself under the plea of ignorance of other facts connected with those already known to him. Good faith rendered it incumbent upon him to make reasonable inquiry, and he took the title charged with the trust of which such inquiry would have informed him;[2] and where the land had been contracted for by a vendee who had paid part of the purchase money the vendor held the land charged with a trust, and a subsequent purchaser with notice would hold subject to the first vendee's lien.[3]

§ 22. **Purchaser from Insolvent Trustee.**—Knowledge of the insolvency of a trustee from whom a conveyance is received in satisfaction of the personal indebtedness of such trustee would be sufficient to put the purchaser upon inquiry as to the *bona fides* of the transaction, and in equity he would be considered as having notice.[4]

§ 23. **Suspicious Circumstances—Inadequacy of Price.** Inadequacy of the price paid, under circumstances other

[1] Swarthout *v.* Curtis, 5 N. Y., 301.

[2] Blaisdell *v.* Stevens, 16 Vt., 179.

[3] Stewart *v.* Wood, 63 Mo., 252; Cavagnaro *v.* Don, 63 Cal., 227.

[4] Pendleton *v.* Fay, 2 Paige, 202. Where time and circumstances of a sale by trustees suggest a breach of trust, the purchaser is put upon inquiry. Stroughill *v.* Anstey, 1 De G., M. & G., 635.

wise of a suspicious character, may be sufficient to excite inquiry. When there is a strong incentive to pass the title to one who will be in a situation to assume the character of an innocent purchaser, the gross disproportion of the amount paid to the real value would be such a badge of fraud as to inform the purchaser so loudly of the intended wrong that he will not be permitted to shelter himself behind the fact that he did not *know* of the defect in his grantor's title. As, where property worth two or three thousand dollars was conveyed for a consideration of $100 to one whom the grantor regarded as "friendly" to himself, and there was no other explanation of the unequal transaction offered by the parties thereto than the friendly relations subsisting between the grantor and grantee, while it was in evidence that the property in the hands of the grantor was subject to an adverse equitable interest, the purchaser was charged with notice.[1]

§ 24. **Mere Inadequacy of Price.**— So, where a bond and mortgage for $8,000, upon which $2,000 of the principal and all the accrued interest had been paid, was transferred for only three-fourths its actual value, and the consideration was received in unsalable goods at forty per cent. above their market price, with no intention of using or disposing of them in the regular way, but with a view to sending them to an auction store, these circumstances were held sufficient to put the purchaser upon inquiry as to the ownership of the security.[2] But mere inadequacy of price realized at a sheriff's, or other involuntary sale, would not tend to put the purchaser upon inquiry, for reasons too obvious to require comment.[3]

§ 25. **Relationship between the Parties.**— The fact that the grantor was the father of the grantee was held to be evidence of the son's knowledge of a trust subject to

[1] Hoppin *v.* Doty, 25 Wis., 573.

[2] Peabody *v.* Fenton, 3 Barb. Ch., 451; Eck *v.* Hatcher, 58 Mo., 235.

[3] Stockett *v.* Taylor, 3 Md. Ch. Dec., 537; Beadles *v.* Miller, 9 Bush, 405.

which the land was held by the father, and properly went to the jury to enable them to determine that fact.[1] And where an insolvent debtor, pressed by his creditors, conveyed absolutely all his property to his son, a young man without property, receiving neither payment nor security, such circumstances were held to proclaim the bad faith of the transaction in such unmistakable terms, that a purchaser from the son, with notice of these facts, could not hold against a purchaser at a sale under an execution against the father.[2]

§ 26. **Notice of Partnership Interest.** — It has been held that notice that the property belongs to a partnership is sufficient to charge it in the hands of the purchaser with partnership debts.[3] But it has been elsewhere decided that a purchaser from a surviving partner who held the property in his individual name, would not, by mere knowledge that it was partnership property, be charged with notice of the trust under which his grantor held, so as to render the property in his hands subject to the partnership debts.[4] In this latter case, however, it was held that the manner of the transfer being secret, and the purchaser knowing that the firm were greatly in debt, would suffice to put such purchaser upon inquiry.[5]

§ 27. **Information Sufficient to Put Upon Inquiry.**— Notice by verbal or written information has elsewhere

[1] Trefts *v.* King, 18 Penn. St., 157; Spurlock *v.* Sullivan, 36 Tex., 511; Clark *v.* Drake, 63 Mo., 354. The fact that plaintiff was related to the trustee, together with his knowledge of defendant's possession, and the inadequacy of the price paid, was held sufficient to warrant the inference that plaintiff had actual notice of a trust in favor of the defendant. Roberts *v.* Mosley, 64 Mo., 507; Phillips *v.* Bank of Lewiston, 18 Pa. St., 394; Du Bois *v.* Barker, 4 Hun, 80. See Hervey *v.* Smith, 22 Beav., 299; Davies *v.* Sear, L. R., 7 Eq., 427; Paul *v.* Connersville, etc., R. Co., 51 Ind., 527.

[2] Ringgold *v.* Waggoner, 14 Ark., 69.

[3] Hoxie *v.* Carr, 1 Sumn., 173; Sigourney *v.* Munn, 7 Conn., 324.

[4] Tillinghast *v.* Champlin, 4 R. I., 173–4, 215; Reynolds *v.* Ruckman, 35 Mich., 80.

[5] Flagg *v.* Mann, 2 Sumn., 486; Du Bois *v.* Barker, 4 Hun, 80.

been considered, for the most part, as express notice;[1] but, as there intimated, in many instances the information is regarded, on account of the source from which it comes, as merely sufficient to put the purchaser upon inquiry, and in some cases would be so vague and uncertain as not even to amount to that. However, where information of the existence of a patent was received through neighborhood report, and from the declaration of a stranger that he had seen it, this was held sufficiently certain to be taken in connection with knowledge of possession and cultivation by tenants of the patentee, as evidence of notice, and would bar the laying a warrant upon the land as waste and unappropriated.[2] And where a mortgagee, who had lost the instrument before having it recorded, informed the purchaser after the notes so secured had been transferred to another, this information was held sufficient to put the party upon inquiry before purchasing, and, failing to inquire, the mortgaged property was bound in his hands for the debt.[3] So, where the communication came from a stranger who had no connection whatever with the title, the notice was held sufficient to charge the purchaser.[4]

§ 28. **Different Sources of Information.** — The character of the person giving unasked advice of this kind is always to be taken into consideration in estimating the value of the information. His relations and intimacy with the parties from whom direct information might naturally be expected to come; his connection with the transaction, and his facilities for obtaining knowledge, as well as the degree of knowledge he displays, should all be considered before the party contemplating a purchase can venture with safety to utterly disregard his advice, or act upon it without further inquiry. Notice coming from a friend or rela-

[1] *Ante*, § 6 *et seq.*
[2] Roberts *v.* Stanton, 2 Munf., 129.
[3] Rowan *v.* Adams, 1 Sm. & M. Ch., 45.
[4] Currens *v.* Hart, Hardin, 37; Erickson *v.* Rafferty, 79 Ill., 209.

tion of the adverse claimant has been held sufficient.[1] While the vague reports of mere strangers have been held not to affect the conscience of the purchaser.[2]

§ 29. **Vague Statements Disregarded.**— Whatever be the source of the information, to be effectual as notice, either express or implied, it must amount to something more than a vague statement that the vendor's title is subject to an equity,[3] or that grantor is unable to make a good title.[4] Or, coming even from the guardian of the equitable claimant, informing the party that he will purchase at his peril.[5] Such wild statements as these could not put the party upon inquiry, for the reason that they do not tend to direct his attention to any specific source of knowledge; and it is contrary to reason and common sense, that one should be prevented from purchasing by what he might fairly regard as the idle gossip of busy-bodies.[6] But the vice of such information consists quite as largely in the uncertainty and vagueness of its statements as in the questionable source from which it proceeds. In general, it is essential that the communication shall have some connection with the subject of intended purchase. Notice of this kind has

[1] Ripple *v.* Ripple, 1 Rawle, 386; Mulliken *v.* Graham, 72 Penn. St., 484; Butcher *v.* Yocum, 61 id., 168. Information from vendor's house agent cannot be disregarded. Lewis *v.* Bradford, 10 Watts, 67; Lawton *v.* Gordon, 37 Cal., 202, 205, 206.

[2] Jaques *v.* Weeks, 7 Watts, 261.

[3] Pittman *v.* Sofley, 64 Ill., 155; Massie *v.* Greenhow, 2 Patt. & H., 255.

[4] Chicago *v.* Witt, 75 Ill., 211. See Loughridge *v.* Boland, 52 Miss., 546; Reynolds *v.* Ruckman, 35 Mich., 80; Lambert *v.* Newman, 56 Ala., 623; Parker *v.* Fay, 43 Miss., 260; Wailes *v.* Cooper, 24 Miss., 208; Buttrick *v.* Holden, 13 Met., 355; Curtis *v.* Blair, 4 Cush. (Miss.), 309; Miller *v.* Cresson, 5 Watts & S., 284; Woods *v.* Farmere, 7 Watts, 382; Epley *v.* Witherow, 7 Watts, 163; Peebles *v.* Reading, 8 Serg. & R., 484; Wilson *v.* McCullough, 23 Pa. St., 440; Butler *v.* Stevens, 26 Me., 484; Lamont *v.* Stimson, 5 Wis., 443; Churcher *v.* Guernsey, 39 Pa. St., 84; Maul *v.* Rider, 59 Pa. St., 167; Shepard *v.* Shepard, 36 Mich., 173.

[5] Jolland *v.* Stainbridge, 3 Ves. Jr., 478.

[6] Woodworth *v.* Paige, 5 O. St., 70.

been held insufficient to charge the conscience of the purchaser when given in connection with a prior transaction.[1]

§ 30. Degree of Certainty Required.— But while it is essential that there should be reasonable certainty as to the facts communicated, it is not to be understood that there should be a full description of the outstanding equity. It suffices if the information is certain within the rule, *id certum est quod certum reddi potest.* If it directs the purchaser to where he can become fully informed of the particulars, he will be affected by it, if he fails to pursue his inquiries in the direction indicated.[2] Being referred to others for information, the purchaser is bound to inquire of the person to whom he is sent.[3] And merely asking one of the parties to a transaction for information does not excuse the purchaser from inquiring further, when the one inquired of refuses to respond to the inquiry, and the purchaser has reason to believe that there are others who are able and willing to supply the information.[4] And where the information is merely inaccurate as to the particular manner in which the subject of contemplated purchase is affected by a certain instrument, this circumstance will not excuse the purchaser from further inquiry. He will be charged with a

[1] Boggs *v.* Varner, 6 Watts & Serg., 469; Meehan *v.* Williams, 48 Pa. St., 238; Fuller *v.* Bennett, 2 Hare, 394; Bank of Louisville *v.* Curren, 36 Ia., 555; Lowthers *v.* Carlton, 2 Atk., 242. See, also, General Steam, etc., Co. *v.* Rolt, 6 C. B., N. S., 550; Thornber *v.* Sheard, 12 Beav., 589; Cobbett *v.* Brock, 20 Beav., 524; Berdoe *v.* Dawson, 34 Beav., 603; Rhodes *v.* Cooke, 4 L. J. Ch., 147.

[2] Jaques *v.* Weeks, 7 Watts, 266; Eply *v.* Witherow, id., 163; Spofford *v.* Weston, 29 Me., 140; Bartlett *v.* Glascock, 4 Mo., 62; Barnes *v.* McClinton, 3 Penn., 67; Water, etc., Co. *v.* Vechte, 21 N. J. Eq., 463; Williamson *v.* Brown, 15 N. Y., 354; Jackson *v.* Caldwell, 1 Cow., 622; Hawley *v.* Cramer, 4 Cow., 717; Parish *v.* Brooks, 4 Brews., 154; Nelson *v.* Sims, 1 Cush., 383; Kerns *v.* Swope, 2 Watts, 75; Blatchley *v.* Osborn, 33 Conn., 226; Bellas *v.* McCarty, 10 Watts, 13; Bunting *v.* Ricks, 2 Dev. & Bat. Eq., 130; Gibbs *v.* Cobb, 7 Rich. Eq., 54.

[3] Wason *v.* Wareing, 15 Beav., 151; Bainbridge *v.* Moss, 3 Jur., N. S., 58; Wilson *v.* Hart, 2 H. & M., 551.

[4] Bainbridge *v.* Moss, 3 Jur., N. S., 58.

knowledge of all the facts he might have learned by following up the line of investigation suggested by the notice received, with diligence.[1] But although notice of a lease will charge the purchaser with notice of its contents, it will only be of usual covenants, and not such as are unusual and extraordinary.[2]

§ 31. **Notice to an Agent.**— Generally, when the doctrine of *notice to agents* is referred to in the books, it is mentioned as constructive notice.[3] But it seems to be governed to a considerable extent by the rules applicable to actual notice. In the case of Barnes *v.* McClinton,[4] Gibson, C. J., in rendering the opinion of the court says: * * * "The purchaser had actual knowledge, through his counsel, of the contents of his paper. * * * Notice to the counsel, in the same transaction, being presumptive notice to the client."[5]

§ 32. **Principal Not Benefited by Agent's Fraud.**— To hold that purchasers could never be affected with actual notice, through an agent or attorney, would be to afford extraordinary facilities to those who wished to take fraudulent advantage of the statutes requiring actual notice of equitable interests, or unrecorded instruments affecting titles to real estate, in order to charge the purchaser. If the agent or attorney to whom was intrusted the duty of investigating the title, and preparing instruments of convey-

[1] Gibson *v.* Ingo, 6 Har., 112; Att'y Gen'l *v.* Jones, 2 Jur., 369; Taylor *v.* Baker, 5 Price, 306; Jackson *v.* Rowe, 2 Sim. & St., 473; Steedman *v.* Poole, 16 L. J. Ch., 349; Farrow *v.* Rees, 4 Beav., 18; Penny *v.* Watts, 1 Macn. & G., 150; Mitchell *v.* Steward, 35 L. J. Ch., 393; Abbot *v.* Gerahty, 4 Jr. Ch., 23; Hinde *v.* Vattier, 1 McLean, 110; 7 Pet., 252; Buck *v.* Paine, 50 Miss., 648; McLeod *v.* First Nat. Bank, 42 Miss., 99.

[2] Van *v.* Corpe, 2 Mylne & K., 269; Flight *v.* Barton, 3 Mylne & K., 282.

[3] See *post*, ch. IX, sec. 672 *et seq.*

[4] 3 Penn. 67; Stanley *v.* Chamberlain, 39 N. J. L., 565; Fiske *v.* Potter, 2 Keyes, 64.

[5] Kennedy *v.* Green, 3 M. & K., 699; Greenfield *v.* Edwards, 2 De G., J. & S., 582.

ance, should be conveniently blind to whatever promised to disclose an adverse claim outside of the public records, or conveniently dumb in regard to such disclosures when made, his principal might be effectually shielded from the consequences of the fraud perpetrated by his representative. It may not be strictly logical to say that "notice to an agent is *actual* notice to the principal." But in the event of this question arising, under such a statute, it will probably be held a fraud upon the owner of the equity, or unrecorded title, for the agent to conceal the knowledge acquired in the course of his principal's employment, and the principal will not be permitted to profit by his agent's fraudulent act.[1]

§ 33. How Principal Affected by Notice to Agent.— It may therefore be confidently stated that while notice to an agent is only regarded as the legal equivalent of personal notice to the principal represented in the transaction in which the agent is engaged, because of the legal presumption, which is conclusive upon the principal, that the agent, in pursuance of his duty, will convey the information to his principal; still, notice to the agent is more than constructive notice to the principal. Even where actual notice is, by statute, alone sufficient to affect purchasers, the fact that actual notice is brought home to the one who represents such principal in the transaction would be as binding upon him as though he had been personally notified. And if the notice comes to the agent in the shape of knowledge of circumstances which should put a man of ordinary prudence upon inquiry, the principal will, by implication, be charged with notice as though he had been personally cognizant of the facts which challenged inquiry from the agent.[2]

§ 34. Purchase After Fruitless Inquiry.— But where notice is implied from knowledge of facts which point with reasonable certainty to the means of ascertaining the truth of the matter involved, proof that inquiries have

[1] See *post*, ch. IX, Part II.

[2] Bank of United States *v.* Davis, 2 Hill, 451.

been prosecuted with reasonable diligence, and the purchaser is led to believe in the absence of any adverse claim,[1] or even fails to obtain any further or more reliable information than that which excited his inquiries,[2] he may purchase with security. The extent to which inquiry should be carried must depend to a considerable degree upon the character of the information received by the purchaser. Where one has received notice of the existence of an instrument which may or may not affect the title, the notice, to charge him with a knowledge of its contents, should be sufficiently explicit to connect the instrument in some way with the matter in which he is interested. He is not to be charged with notice of the contents of any such instrument by his mere failure to inquire, when such failure is perfectly consistent with good faith, ordinary diligence, and a general disposition to fair dealing.[3]

§ **35. Information Allaying Suspicion.**— So where the attaching creditor was informed by the debtor that he had already executed a deed to another, but that such deed had neither been acknowledged nor delivered, and in corroboration of the latter statement exhibited the deed, which was still in his own possession, it was held that the creditor might rely upon the truth of such statement without further inquiry or investigation.[4] And if the information, coming from the party supposed to be interested adversely to the

[1] Hudson *v.* Warner, 2 H. & G., 415.

[2] Jackson *v.* Van Valkenburgh, 8 Cow., 260.

[3] Kenney *v.* Browne, 3 Rigd. P. C., 512; West *v.* Reid, 2 Ha., 249; Harryman *v.* Collins, 18 Beav., 91; Cox *v.* Coventon, 31 Beav., 378; McQueen *v.* Farquhar, 11 Ves., 482; Perry *v.* Holl, 2 De G., F. & J., 38; Dodds *v.* Hills, 2 H. & M., 424; Jones *v.* Smith, 1 Hare, 43; Ponder *v.* Scott, 44 Ala., 241.

[4] Rogers *v.* Jones, 8 N. H., 264; *Re* Bright's Trusts, 21 Beav., 430; Jones *v.* Smith, 1 Hare, 43; S. C., 1 Phil., 244; Wilson *v.* Short, 6 Hare, 366; Vignolles *v.* Bowen, 12 Ir. Eq., 194; Smith *v.* Reese, etc., Co., L. R., 2 Eq., 264; Grosvenor *v.* Green, 28 L. J. Ch., 173; McCulloch *v.* Gregory, 1 Kay & J., 286; Stewart's Case, L. R., 1 Ch. App., 574; Jones *v.* Williams, 24 Beav., 47; Espin *v.* Pemberton, 3 De G. & J., 547; Buttrick *v.* Holden, 13 Met. (Mass.), 355; Curtis *v.* Blair, 4 Cush. (Miss.), 309; Rogers *v.* Wiley, 14 Ill., 65.

vendor, is in effect either an express or implied denial of his own right or title, the vendee may rely upon such information, and will be protected in his purchase.[1]

§ 36. The Effect of Reliance on Information from Doubtful Sources. — But where the purchaser and his agent had been advised of a contract for the sale of the land by the agent of the prior purchaser, which agent had been prosecuted for embezzling funds in the transaction, and subsequently informed the last purchaser that the contract with his principal was broken off, it was held that the subsequent purchaser had no right to rely upon such statements from so doubtful a source.[2]

§ 36a. A Practical View of the Distinction between Actual and Constructive Notice.— The only reason for treating that kind of notice which is called *actual* separately from that which is denominated *constructive* is that the general principles of notice may be appealed to in cases where the law recognizes, as controlling, only notice of the former class. When the rights of parties litigant may be affected by notice generally, it is of little consequence whether it be of the one kind or the other. There is a distinction between the two which in a proper case will be found of vital importance. As, for example, when the right of recovery of an indorser of negotiable paper, received in the ordinary course of business before maturity, is questioned by the payer, upon the ground that it was purchased by the holder with notice of facts which would impeach its validity between antecedent parties. The decided weight of authority is in support of the doctrine that the purchaser's rights can only be affected by actual notice of such

[1] McGehee *v.* Gindrat, 20 Ala., 95; Pearson *v.* Morgan, 2 Brown, Ch., 353; Burrows *v.* Locke, 10 Ves., 470; Barry *v.* Croskey, 2 Johns. & H., 21; Ibbotson *v.* Rhodes, 2 Vern., 554; Lee *v.* Howlett, 2 Kay & J., 531; Slim *v.* Croucher, 1 De G., F. & J., 518; Bridge *v.* Beadon, L. R., 3 Eq., 664; *infra*, § 36, and cases cited.

[2] Mulliken *v.* Graham, 72 Pa. St., 484; Price *v.* McDonald, 1 Md., 403; Hudson *v.* Warner, 2 Har. & G., 415; Russell *v.* Petree, 10 B. Mon., 184; Littleton *v.* Giddings, 47 Tex., 109.

facts.[1] Here the question of notice is strictly one of fact, and cannot be determined by the rules of constructive notice, properly so called.[2] But this essential distinction cannot be made for practical purposes, either where actual notice is required by statute, or where it is demanded by a rule of the common law, by laying down an inflexible rule of classification, that shall clearly distinguish notice of the one kind from the other for all cases where the distinction is material. It cannot be said that a purchaser can never be charged with actual notice, when the circumstances make out a case of constructive notice. Although it be strictly true that actual notice is a question of fact, it is equally true that it may be established by the aid of conclusive presumptions. The distinction is between actual and constructive *notice*, and not between actual *knowledge* and constructive notice. The difference in meaning between *knowledge* and *notice* must not be overlooked,[3] for it is equally important with the distinction between the different kinds of notice. The fact to be established, when the case requires proof of actual notice, is that the party acquired his pretended rights with notice, and this may be true, although the purchase may have been made in actual ignorance of the facts of which knowledge is imputed to the purchaser.[4]

[1] *Post*, § 84 *et seq.*

[2] Goodman *v.* Simonds, 20 How., 343; *post*, § 85.

[3] *Supra*, §§ 3, 4.

[4] This subject will be further considered in connection with CONSTRUCTIVE NOTICE. (*Post*, § 42 *et seq.*) And examples will be given of the application of the principles herein contended for, in connection with notice by *Registration, Title Papers, etc. Post*, ch. III *et seq.*

II. Constructive Notice.

§ 37. Definitions.
38. Held Same as Implied Notice.
39. Constructive Notice Prescribed by Statute.
40. Distinction between Different Kinds of Notice.
41. Different Kinds of Constructive Notice.
42. Inference of Law.
42*a*. Same — Distinction between, and Inference of Fact.
43. Contents of Writing Known to Party Executing the Same.
44. Possession as Constructive Notice.
45. Purchaser *Pendente Lite.*
46. Recitals in Title Paper.
47. Possession of Deeds.

§ **37. Definitions.** — *Constructive notice* is defined by Chief Baron Eyre as "in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow of its being controverted."[1] Judge Story defines it as "knowledge imputed by the court on presumption, too strong to be rebutted, that the knowledge must have been communicated."[2]

§ **38. Held Same as Implied Notice.**— These definitions exclude all those cases where the legal presumption of notice is subject to rebuttal or explanation. Chancellor Kent, however, says, "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry."[3] Whatever presumptions of notice might arise from information sufficient to put the party upon inquiry could be explained away by showing that, notwithstanding diligent inquiry was made, it proved fruitless of results, or the imputation of knowledge may be rebutted by proof that the party thus sought to be charged was misled, and lulled into security by countervailing circumstances, or a denial of the information by which inquiry

[1] Plumb *v.* Fluitt, 2 Anstr., 432; Kennedy *v.* Green, 3 M. & K., 699, 719; Wilde *v.* Gibson, 1 H. of L. Cas., 605.

[2] Story's Eq. Jur., § 399.

[3] Sterry *v.* Arden, 1 John. Ch., 261.

was originally excited. There is another definition more comprehensive in its scope than either of the preceding, and is laid down as follows: "Constructive notice is a legal inference of notice of so high a nature as to be conclusive, unless disproved, and is in most cases insusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice, and believed the vendor's title to be good."[1]

§ **39. Constructive Notice Prescribed by Statute.**— While the foregoing definitions of this title are doubtless sufficiently full and comprehensive in the connection in which they are employed, they do not convey a distinct idea of that kind of notice which is *constructive*, as distinguished from that which is *actual*, without reference to the connection; for this term includes not only the evidence of notice where the presumptions are violent, or the imputation of knowledge from presumptions too strong to be rebutted, that such knowledge has been communicated, or a legal inference of notice of a high character; but it also embraces that which is made conclusive upon the party notified by the provisions of a statute, without regard to the evidence of actual notice, or the actual probabilities of the communication of the knowledge imputed.

§ **40. Distinction between Different Kinds of Notice.**— One of the distinguishing features between these two kinds of notice, which seem to glide imperceptibly into each other, is that when the facts upon which the presumption is founded have been ascertained, the question of constructive notice is always for the court,[2] while the question of

[1] Lead. Cas. Eq., vol. II, part 1, 77 (Am. note). The more this definition is examined the less satisfactory it seems. A *legal* presumption capable of being disproved seems a *non sequitur*. Story's definition is better. *Infra*, § 40.

[2] Birdsall *v.* Russell, 29 N. Y., 220. It is at least questionable whether all the confusion upon this subject may be avoided by observing the distinction above laid down. While I shall always maintain that possession is a fact from which actual notice may be inferred, I shall not deny that it may furnish a foundation for that conclusive presumption which

actual notice is frequently submitted to the jury, together with the evidence from which the inference of fact is drawn, without charge or instruction as to the weight of the evi-

is an essential element of constructive notice. The same is true of notice derived from *title papers* in the purchaser's possession, or constituting essential links in a chain of title to property owned by him. At a certain stage of this controversy between prior and subsequent purchasers, possession may be regarded as nothing more than evidence of notice. At another stage of the same controversy, it becomes conclusive either as evidence of actual notice, or as a presumption, or implication of notice. Thus, suppose it is shown that the prior purchaser was in actual possession of the premises at the time the same were conveyed to the subsequent vendee. The latter is not concluded by this showing. He may overcome the inference by evidence that he made diligent inquiry of the party in possession, and gained no knowledge of the latter's claim; or, that such possession was consistent with the terms of an instrument of record, of which the subsequent purchaser had personal knowledge and upon which he was led to rely. There are numerous other modes of overcoming the effect of possession as an inference of notice; but evidence that merely denies all knowledge or information of such possession, or the claim of title under which the occupant held the premises, would not tend in the least to this end. Before a denial of knowledge of a fact of this kind can be received and estimated as of any value whatever, it must appear that the party seeking to avoid its effect has exercised diligence in pursuit of such knowledge, or that some other fact was presented to his notice that removed the impressions made by the fact of possession. If the evidence of notice, and absence of notice, goes no farther than proof of the prior purchaser's open, notorious and exclusive possession under a claim of title, on the one hand, and the simple denial of the subsequent purchaser that he had any notice or knowledge of such possession, or of the right by which the possessor claimed to occupy the premises, it must be taken as *conclusively* established that the subsequent purchase was made with notice of the prior vendee's right. Whether the question is regarded as one of *actual* or *constructive* notice, it must be regarded as a question of law, except so far as the credibility of witnesses is concerned. If the jury believe from the evidence that the possession was of the character indicated, it is of no consequence whether the purchaser knew it or not. If the purchaser is conclusively presumed to know who occupies the premises, in the absence of proof of inquiry, he will be conclusively presumed to know all the facts he might have learned by inquiry of the party in possession. This comes very near meeting all the requirements of constructive notice.

dence.[1] The distinction here contended for is well set forth by a learned text-writer in the following language: "It will have been perceived that the term constructive notice is here used in a somewhat indefinite sense. The same is true in regard to most text-writers and judges. This form of expression is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by *lis pendens*. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called constructive notice, is rather implied notice or presumptive notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a presumption of fact. If this distinction were carefully preserved by writers upon this subject, it would enable us to escape a good deal of confusion in regard to the subject of notice."[2]

§ 41. **Different Kinds of Constructive Notice.** — The following are conspicuous examples of constructive notice as it affects subsequent purchasers and incumbrancers of real estate: 1. Notice by registration of instruments affecting the title. 2. Notice from title papers through which the title of the grantor is traced. 3. *Lis pendens*. To which may be added, possession by the adverse claimant under claim of ownership. All of which, however, are separately treated in the succeeding chapters.[3] Publication is also a common substitute for notice, and, when served in this manner, is generally known as constructive notice.[4] This,

[1] Mayor, etc., *v.* Williams, 6 Md., 235; Trefts *v.* King, 18 Penn. St., 157.

[2] Story's Eq. Jur., § 410*a*. For examples see and examine the cases cited in Jones *v.* Smith, 1 Hare, 43, 55, 56.

[3] See *post*, chs. III, IV, V, VI.

[4] See *post*, ch. XI.

like registration, is purely of statutory creation, and is consequently subject to strict construction.

§ 42. **Inference of Law.**— The notice which arises from *legal* inference drawn from facts and circumstances sufficient to put the party upon inquiry is only effectual to charge a purchaser when the circumstances are of such a character that to fail in obtaining the knowledge would be gross or culpable negligence.[1] And this, we have seen, is only distinguished from that kind of actual notice arising from inference of *fact* by the most shadowy line.[2] Judge Gibson, in Weidler *v.* Farmers' Bank of Lancaster,[3] says that "constructive notice is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice, when it arises at all, being conclusive even against the truth of the fact, and therefore constructive notice is always insufficient to fix on a party actual knowledge as the groundwork of express fraud. * * * There might be a case of so gross a nature as to raise a presumption from the fact itself, that the judgment creditor knew the debtor to be without color of title."

§ 42a. **Same — Distinction Between, and Inference of Fact.**— Although the distinction between the legal presumption of notice, and *facts* from which notice may be inferred, is insisted upon by the learned judge whose language is quoted in the next preceding section, it is with more peremptoriness than clearness. There is nothing inconsistent in drawing a legal inference, and an inference of fact, from the same circumstances. There are cases of conflicting rights to property which cannot be adjudicated upon the basis of constructive notice, for the reason that, under the statute, or the governing rule of common law, the purchaser can only be affected by actual notice of the adverse claim.[4] Nevertheless, there is not necessarily a

[1] Ware *v.* Lord Egmont, 4 De G., M. & G., 460.
[2] *Ante*, § 40.
[3] 11 S. & R., 134.
[4] *Ante*, § 36*a*.

failure of evidence of notice of the requisite actuality, merely for the reason that the same facts might be adduced in support of the theory of constructive notice. Thus, where it is held that a purchaser has constructive notice of every fact disclosed by the muniments which constitute the claim of title of the subject of purchase, the presumption is conclusive,[1] and at the same time is regarded as the legal equivalent of actual notice, whether the adverse claim becomes actually known to the purchaser or not.[2] Actual possession under a claim of title is also a circumstance that is equally conclusive.[3] The only distinction to be made where these circumstances are appealed to as evidence of actual notice, and when they are relied on as constructive notice, is that, in the latter event, the facts from which the inference is drawn are all admitted without qualification, or conclusively proved, and in the former they are disputed, or qualified by other facts. When left to the jury, it must be under instructions that give full weight to them as evidential facts, not to be overcome by a mere denial of knowledge. Notice by registration, and by *lis pendens*,[4] differ from possession, and recitals in the chain of title, in something more than the number of facts upon which they depend. If an instrument is properly registered, it will be constructive notice, and if the party to be charged has seen the record, actual notice of its contents. The pendency of the action is constructive notice, but requires something more than the service of original process upon the vendor to make it actual notice to the vendee. But either registration or *lis pendens* is conclusive upon the party, without any regard to the probabilities, or even the *possibility*, of his having gained a knowledge of the prior right. The same is true of notice by publication where that is authorized by statute.[5] When notice depends upon an inference

[1] *Post*, § 310 *et seq.*
[2] *Post*, § 308.
[3] *Supra*, § 40, note.
[4] *Post*, § 337 *et seq.*
[5] *Post*, § 449 *et seq.*

of fact, it is where the party to be charged might have gained knowledge by the exercise of due diligence. When it depends upon an inference of law, he will be charged, though actual knowledge was utterly beyond his reach. The inference of fact may be overcome, or qualified by other facts. The inference of law is final.

§ 43. Contents of Writing Known to Party Executing Same.— Where the notice with which a party is sought to be affected is traced through an instrument executed by himself, it matters not whether such instrument constitutes a necessary link in his chain of title, he will be conclusively presumed to have full knowledge of its contents, except where his signature has been obtained by fraud or deceit.[1]

§ 44. Possession as Constructive Notice.— The same rules govern where the purchaser is charged with constructive notice by adverse possession, as where such possession is regarded merely as evidence from which the jury are at liberty to infer actual notice. The possession must be clear, open, notorious and unequivocal, at the time of the purchase.[2]

§ 45. Purchaser Pendente Lite.— Independent of the doctrine by which purchasers *pendente lite* are affected with constructive notice of the suit, so as to bind the property in their hands by the judgment, it has been held that the clerk of a court in which was pending a suit for specific

[1] Howard Ins. Co. *v.* Halsey, 4 Sandf., 565; S. C., 8 N. Y., 271.

[2] Meehan *v.* Williams, 48 Pa. St., 238; Hughes *v.* U. S., 4 Wall., 232; Landes *v.* Brant, 10 How., 348; Smith *v.* Shane, 1 McLean, 22; Lea *v.* Polk Co., etc. Co., 21 How,, 499; Buckingham *v.* Smith, 10 Ohio, 288; Knox *v.* Thompson, 1 Litt., 350; Hanly *v.* Morse, 32 Me., 287; Griswold *v.* Smith, 10 Vt., 452; Harris *v.* Carter, 3 Stew., 233; Johnston *v.* Glancy, 4 Blackf., 94; Moreland *v.* Lemaster, 4 Blackf., 383; Walker *v.* Gilbert, 1 Freem. Ch., 75; Diehl *v.* Page, 3 N. J. Eq., 143; Wilty *v.* Hightower, 6 Sm. & M., 345; Jenkins *v.* Bodley, 1 Sm. & M. Ch., 338; Brown *v.* Andover, 1 Mon., 193; Pallen *v.* Hollidaysburg, 40 Pa. St., 206; Holmes *v.* Powell, 8 De G., M. & G., 580; Hardy *v.* Summers, 10 G. & J., 316; *post*, § 273 *et seq.*

performance was constructively charged with notice of the nature of plaintiff's demand.[1]

§ 46. **Recitals in Title Papers.**— Perhaps as striking an example of the extent of this doctrine as could be found is the case of Peto *v.* Hammond,[2] where a vendor's lien was retained in the deed to the grantor of the party charged, which deed had always remained in the original vendor's possession, and the grantee of the party against whom the debt stood that was secured by the lien had never had an opportunity to inspect the instrument. Nevertheless, it was held that he had constructive notice of such lien, for the reason that it was recited in a deed which formed a necessary link in his chain of title.[3] But where such recital is relied upon as constructive notice, it must be in an instrument affecting the title to the same piece of property to which such recital refers.[4]

§ 47. **Possession of Deeds.**—Where the title deeds necessarily pass with the title, and strict reliance is not placed upon the registry of instruments affecting land titles, notice that the title deeds of an estate are in the possession of some one else than the grantor is generally held to be constructive notice of whatever claim the one in possession of such deed had against the property.[5] And when the title deeds are not found in the possession of the vendor it becomes the duty of the vendee to make diligent inquiry therefor. He cannot suffer himself to be put off with frivolous excuses for their absence, and purchase with security.[6] But this must be understood to depend upon

[1] Dickerson *v.* Campbell, 32 Mo., 544.

[2] 30 Beav., 495; S. C., 8 Jur., N. S., 550.

[3] Ferrars *v.* Cherry, 2 Vern., 384; Att'y General *v.* Flint, 4 Hare, 147; Peto *v.* Hammond, 30 Beav., 495; Walter *v.* Maunde, 1 J. & W., 181; Smith *v.* Capron, 7 Hare, 191; Lewis *v.* Bond, 18 Beav., 85; Spunner *v.* Walsh, 10 Ir. Eq., 386.

[4] Boggs *v.* Varner, 6 W. & S., 469.

[5] Hiern *v.* Mill, 13 Ves., 114.

[6] Dryden *v.* Frost, 3 M. & C., 670; Jones *v.* Williams, 24 Beav., 47; Tybee *v.* Webb, 6 Beav., 552; Worthington *v.* Morgan, 16 Sim., 547; Allen

who has the actual custody of such deeds; as where they are, according to regular usage, in the hands of the vendor's solicitor, they will be regarded as in the possession of the vendor himself, and hence the solicitor's possession will not impart notice of his claims on the property.[1] The inference to be drawn from the vendor's want of possession of the title deeds, being one of law, will be confined in its operation to proper boundaries and will not be unduly extended by implication.[2]

v. Knight, 5 Hare, 272; Colyer *v.* Finch, 5 H. L., 905; Hewitt *v.* Loosemore, 9 Hare, 449; Hopgood *v.* Ernest, 3 De G., J. & S., 116; Peto *v.* Hammond, 30 Beav., 495; Atterbury *v.* Wallis, 8 De G., M. & G., 454.

[1] Bozon *v.* Williams, 3 Younge & J., 150.

[2] Griffith *v.* Griffith, 1 Hoff. Ch., 153.

CHAPTER II.

NOTICE TO PURCHASERS OF DIFFERENT KINDS OF PROPERTY.

§ 48. Division of Subject.
49. Purchasers of Real Property.
50. Purchaser *Mala Fide*.
51. Notice of Marriage Settlement.
52. Parol Contract to Convey.
53. When Vendee Required to Perform in Lieu of Vendor.
54. Notice of Adopted Son's Equity.
55. Prior and Subsequent Contracts to Convey.
56. Possession of Title Deeds.
57. Purchaser with Knowledge of Trust.
58. Mortgagee with Knowledge of Trust.
59. Notice to Trustee.
60. Notice Prior to Payment.
61. Purchaser without, from Purchaser with, Notice.
62. Purchaser with, from Purchaser without, Notice.
63. Re-purchase by Original *Mala Fide* Purchaser.
64. Unregistered Conveyances.
65. How Purchasers May be Notified.
65*a*. Due Inquiry.
66. Different Kinds of Notice.
67. Purchasers of Chattels.
68. Innocent Pledgees.
69. Mere Possession Not Conclusive Evidence of Title.
70. Secret Instructions to Broker.
71. Secret Lien.
72. Conditional Sales.
73. Pledge.
74. Condition May be by Parol.
75. Property Reclaimed in an Altered State.
76. *Caveat Emptor*.
77. Chattel Mortgages.
78. Possession of Chattels.
79. Choses in Action.
80. Negotiable Instruments.
81. Lost Bill.
82. Holder Affected Only When Grossly Negligent.
83. Bad Faith Requisite to Defeat Holder's Rights.
84. Purchaser without Notice Protected.

85. Same -- Knowledge a Question of Fact.
86. Facts Which Excite Inquiry Held Inadmissible.
87. Circumstances Which Put Purchaser on His Guard.
88. Bad Faith an Inference of Fact.
89. Stolen Securities — Avoidance of Knowledge.
90. Inquiry Excited by Inspection of Paper.
91. When General Notice Sufficient.
92. Suspicious Circumstances.
92*a*. The Time When Notice Must be Acquired to Affect Purchasers.
93. Payment Before and After Notice.
94. Patent Defects Affecting Purchaser.
94*a*. Notice of Want or Failure of Consideration.
94*b*. Notice of Diversion of Accommodation Paper.

§ 48. **Division of Subject.**— It is a well-recognized rule of equity jurisprudence that a purchaser, with notice of a right in another, is liable in the same manner, and to the same extent, to the person in whom is the right of which he had notice, as was the one from whom he purchased.[1] And this liability attaches in favor of such person whether he has united in himself both the legal and equitable titles, or is merely the owner of an equitable interest, with the legal title in the vendor.[2] It applies to all classes of property, whether it be real, personal or mixed,— in possession or in action. It is the purpose, in this place, to show when and how it applies to these different kinds of property, which, for convenience, will be considered in the following order: 1. Real property. 2. Chattels in possession. 3. Things in action,— with special reference to negotiable instruments.

§ 49. **Purchasers of Real Property.**— Except where the statute otherwise provides, a purchaser of real property

[1] Coldwell *v.* Carrington, 9 Pet., 86; Moreland *v.* Le Master, 4 Blackf., 383; Edwards *v.* Morris, 2 A. K. Marsh., 65; Langdon *v.* Woodfield, 2 B. Mon., 105; Allen *v.* Sanders, 2 Bibb, 94; Yoder *v.* Swope, 3 Bibb, 204; Taylor *v.* Stibbert, 2 Ves. Jr., 437; Dunbar *v.* Fredennick, 2 Ba. & Be., 310; Steedman *v.* Poole, 6 Hare, 193; Smith *v.* Denton, 42 Ia., 48; Watson *v.* Phelps, 40 Ia., 482.

[2] Saunders *v.* Dehew, 2 Vern., 271; Allen *v.* Knight, 5 Ha., 272; Carter *v.* Carter, 2 K. & J., 617; Cory *v.* Eyre, 1 De G., J. & S., 149.

will be affected by notice, either actual or constructive, of an interest or title adverse to that of his grantor.[1] But a purchaser's right of action for breach of covenants, "grant, bargain and sell," is not affected by notice, actual or constructive, of an incumbrance existing at the date of the purchase.[2] Notice which is constructively given by the registration of instruments affecting the title is perhaps the most general; but, as this portion of the subject is more fully treated in the next succeeding chapter, it will not receive further attention here.[3]

§ 50. **Purchaser Mala Fide.**— The general ground upon which courts of equity interfere for the protection of the owner of an equitable interest in real estate, as against the subsequent purchaser with notice, is that it is in bad faith for one to attempt the circumvention of the true owner of the property, by endeavoring to anticipate him in gaining the advantage to be derived from an acquisition of the legal title.[4] Lord Hardwicke, in a leading case upon this subject, which has been so frequently cited as to become familiar to the profession, declares the substance of the rule in saying that "the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser."[5] And this principle is applied to that case by the learned chancellor, notwithstanding the fact that the purchase declared to be fraudulent was for a valuable consideration, and the notice by which the purchaser was affected was given to an agent, and there was no evidence that it had been communicated to the principal.[6]

[1] Gerson *v.* Pool, 31 Ark., 85; Haskell *v.* State, id., 91; Colman *v.* Watson, 54 Ind., 65; Lamont *v.* Cheshire, 65 N. Y., 30.

[2] Clore *v.* Graham, 64 Mo., 249.

[3] See *post*, ch. III.

[4] Kennedy *v.* Daly, 1 Sch. & Lef., 355; Coble *v.* Nonemaker, 78 Penn. St., 501; Kepler *v.* Davis, 80 id., 153; Scott *v.* Dunbar, 1 Moll., 442; Mackreth *v.* Symmons, 15 Ves., 350; Rice *v.* Rice, 2 Drew, 73; Hiern *v.* Mill, 13 Ves., 114; Coles *v.* Sims, 5 De G., M. & G., 1.

[5] Le Neve *v.* Le Neve, 3 Atk., 646; S. C., 1 Ves. Sr., 64.

[6] See ch. IX.

§ 51. Notice of Marriage Settlement.— Upon this principle, where the defendant purchased an estate with notice of the fact that it had previously been entailed to the plaintiff in a marriage settlement by his father, who was defendant's grantor, it was held that such purchaser took the estate charged with the trust, which the court would compel him to execute, by accounting for the consideration received upon transferring the property to innocent purchasers.[1]

§ 52. Parol Contract to Convey.— So a purchaser with notice of a parol contract, executed on the part of one of the parties, between the owner of the fee under whom he claimed, and a tenant *per autre vie*, to change the *cestui que vie* by inserting the name of tenant's wife instead of an older life, was held by decree to specific performance of the contract.[2]

§ 53. When Vendee Required to Perform in Lieu of Vendor.— There are also numerous cases, where the owner of the equity has gone into possession of the real estate under a parol contract of purchase, which only becomes the subject of equitable enforcement by reason of the fact that there is a part performance by the covenantee which takes it out of the operation of the statute of frauds. In these cases, the purchasers who took with notice of the facts were decreed to perform precisely as though they were the original contracting parties.[3]

§ 54. Notice of Adopted Son's Equity.— And even where the claimant's equity is not fortified by possession and improvement, there are cases of a peculiar character where the courts have granted relief against the purchaser with notice. As where an agreement was entered into with the father of an infant son, by an uncle, to adopt the nephew as his own child, with provision that his property should descend to such adopted son on the death of the

[1] Ferrars *v.* Cherry, 2 Vern., 383.

[2] Crofton *v.* Ormsby, 2 Sch. & Lef., 583; Bryant *v.* Booze, 55 Ga., 438.

[3] Daniels *v.* Davison, 16 Ves., 249; Blatchley *v.* Osborn, 33 Conn., 226.

uncle and wife. Pursuant to this agreement the child was taken into the uncle's family, and lived with him until he reached the age of twenty-five years. At the age of sixty-five the uncle, in consideration of the support of himself and wife for the remainder of their lives, conveyed a considerable portion of his property to his wife's sister. The grantee, taking the deed with notice of the nephew's equity, was held not to be a *bona fide* purchaser, and the nephew was entitled to relief.[1]

§ 55. Prior and Subsequent Contracts to Convey.— As between antecedent covenantees and subsequent covenantees with notice, the first contract will be enforced. The prior equity is entitled to the same protection against subsequent purchasers in bad faith, as though the contest lay between rival claimants to the legal title. So, where one contracted with two different parties to sell the same estate, the one first in time would be entitled to specific performance, and the subsequent covenantee, having obtained the legal title after notice of the prior equity, was decreed to convey to the first covenantee.[2]

§ 56. Possession of Title Deeds.— It has been held in England, where the possession of the title deeds usually accompanies the title, that notice that such deeds were in the possession of another than the grantor was sufficient notice of an equitable claim by the holder of the deeds, to bind the property in the hands of the purchaser. Especially is this so held where, with notice of such possession, there is an entire absence of inquiry with regard to the causes for the absence of the title deeds from the possession of the grantor.[3] But when it appears that the purchaser has been

[1] Vanduyne *v.* Vreeland, 12 N. J. Eq., 142.

[2] Potter *v.* Sanders, 6 Hare, 1; Taylor *v.* Stibbert, 2 Ves. Jr., 437; Bryant *v.* Booze, 55 Ga., 438.

[3] Ratcliffe *v.* Barnard, L. R., 6 Ch., 652; Maxfield *v.* Burton, L. R., 17 Eq., 15; Rolland *v.* Hart, L. R., 6 Ch., 678; Broadbent *v.* Barlow, 3 De G., F. & J., 570; Perry *v.* Holl, 2 De G., F. & J., 38; Espin *v.* Pemberton, 3 De G. & J., 547; Roberts *v.* Croft, 2 De G. & J., 1; Atterbury *v.* Wallis, 8 De G., M. & G., 454; Penny *v.* Watts, 1 Macn. & G., 150; Scott, N. R.,

reasonably diligent in the prosecution of his inquiries as to the reasons for the possession of the title deeds by one other than the grantor, and a reasonable and satisfactory excuse has been made for the circumstance, this will remove the imputation of fraud or gross negligence upon which the presumption of notice is founded.[1]

§ 57. **Purchaser with Knowledge of Trust.**— Where one with knowledge of a trust, or notice thereof sufficient in equity to affect his conscience, purchases from the trustee, the property so purchased will still be subject to the trust, and he will be held to be a trustee for the benefit of the person whose rights he has thus sought to defeat.[2]

§ 58. **Mortgagee with Knowledge of Trust.**— Upon the same principle, if a mortgagee, with notice of a trust, should obtain a conveyance from the trustee in order to protect his mortgage, the original trust would attach to the title in his hands, and he would not be permitted to reap any advantage by such conveyance. By the purchase he would take the place of such trustee, with reference to the title, and it would be his duty to execute the trust. To allow him to enjoy an advantage from such a transaction would be equivalent to permitting him, in order to save himself, to commit a breach of trust.[3]

§ 59. **Notice to Trustee.**— A trustee is chargeable with notice of the equities arising from the trust, and, being a member of a firm, notice coming to him in this manner will affect his partners in the same manner and to same extent as though they had been personally notified,[4] for the

366; Bradley *v.* Riches, L. R., 9 Ch. D., 189; Hiern *v.* Mill, 13 Ves., 114; Birch *v.* Ellames, 2 Anst., 427; Dryden *v.* Frost, 3 Myl. & Cr., 670.

[1] Evans *v.* Bicknell, 6 Ves. Jr., 173; Finch *v.* Shaw, 19 Beav., 500; Dowle *v.* Saunders, 2 Hem. & Mill, 242.

[2] Maundrell *v.* Maundrell, 10 Ves., 260; 1 Story, Eq. Juris., § 395.

[3] Foster *v.* Blackstone, 1 Mylne & K., 297; Saunders *v.* Dehew, 2 Vern., 271.

[4] Stevens *v.* Goodenough, 26 Vt., 676.

court will not regard the character in which the notice was received.[1]

§ 60. **Notice Prior to Payment.**—In order to affect purchasers it is not always necessary that the notice should be actually received before the execution and delivery of the conveyance. It will be sufficient if given before the payment of the purchase money,[2] and when there has been a partial payment before notice received, the purchaser will be affected *pro tanto*.[3]

§ 61. **Purchaser without, from Purchaser with, Notice.**—Where a purchaser acquires the title with notice, actual or constructive, of an adverse title or interest in another, although as between himself and the equitable owner he holds the title charged with a trust in favor of the latter, he may by a conveyance to a *bona fide* purchaser for value, who has no notice of the trusts with which the property stands charged, effectually cut off the rights of the equitable claimant; for the purchaser *without* notice from a purchaser who took *with* notice will occupy no worse position than one who innocently purchases from the first fraudulent grantor.[4]

§ 62. **Purchaser with, from Purchaser without, Notice.**—So, where the *bona fide* purchaser conveys to another who has notice of the equity at the time of his purchase, the title will nevertheless pass discharged of the trust to which it was subject in the hands of the first grantor.[5] For to merely protect the title of the first purchaser without notice, and hold the property subject to prior equities, whenever it subsequently came to the hands of one who had notice of such equity, would be to give the honest purchaser

[1] Barney *v.* Currier, 1 D. Chap., 315.

[2] Henry *v.* Raiman, 25 Penn. St., 354; Ringgold *v.* Bryan, 3 Md. Ch. Dec., 488.

[3] Hardin *v.* Harrington, 11 Bush (Ky.), 367.

[4] Hawley *v.* Cramer, 4 Cow., 717; Hardin *v.* Harrington, 11 Bush (Ky.), 367.

[5] Lowther *v.* Carlton, 2 Atk., 242; Cromwell *v.* County of Sac, 6 Cent. L. J., 209 (U. S.), 1877.

but a fruitless advantage. Such a rule would deprive the property of nearly its entire market value, because purchasers without notice would become more difficult to find as the defect of title became more generally known.

§ 63. **Re-purchase by Original Mala Fide Purchaser.**— The same reasons will not operate in favor of the original purchaser *mala fide*, when he re-acquires the title after it has passed through the hands of *bona fide* purchasers. By holding that the trust would re-attach in his hands, but a single possible purchaser is disqualified, which could not materially affect the market value of the property. Besides, to extend to him protection as an innocent purchaser, because of the purgation of the title by passing through clean hands, would be to facilitate the perpetration of fraud.[1]

§ 64. **Unregistered Conveyances.** — Notwithstanding the statutory provisions by which the registration of conveyances is required in order to give them validity as against subsequent purchasers, these statutes are uniformly construed not to favor those who purchase with notice of prior unregistered conveyances.[2] To hold otherwise would be to convert the registry laws, which were originally intended as a protection against fraud, into the most formidable accessories of fraud.[3] When a party contemplating a purchase is by information, or other facts that come to his knowledge, put upon inquiry as to the validity of the title, he is naturally led to an examination of the record of conveyances, but his inquiries should not end here.[4] When the matter of which he has received notice is an unrecorded conveyance, or an equitable interest that does not appear of record, he cannot be said to have made

[1] Kennedy *v.* Daly, 1 Sch. & Lef., 355; Bovey *v.* Smith, 1 Ver., 60; Schutt *v.* Large, 6 Barb., 373; Story, Eq. Jur., § 410, and cases cited.

[2] See *post*, §§ 226, 231 *et seq.*, and cases cited.

[3] Story, Eq. Jur., § 395 *et seq.*

[4] Reynolds *v.* Ruckman, 35 Mich., 80; Illinois Central R. R. *v.* McCullough, 59 Ill., 166.

due inquiry, or to have exercised due diligence, by merely consulting the county records.[1]

§ 65. **How Purchasers May be Notified.**— The methods by which notice of prior equities or unregistered conveyances may be given, so as to affect subsequent purchasers, are as various as the means by which knowledge or information of any fact may be communicated, or by which persons may be led to believe in the existence of such facts. They include those facts and circumstances which are held to constitute *constructive* notice, as well as those amounting in the estimation of the court or jury to *actual* notice, and affect subsequent purchasers and incumbrancers alike. The most obvious and direct manner in which the subsequent party may be warned of the adverse interest is by *actual knowledge* of the prior conveyance or equity; for in determining questions of good faith, knowledge is regarded as equivalent to notice of the highest degree, though it may be otherwise when notice is requisite to perfect a right, or put the person to whom it is given in default.[2] Then would naturally follow in their order, *express* notice, or direct information, oral or written, from some person in possession of actual knowledge;[3] and implied notice, or knowledge of collateral circumstances sufficient to put the purchaser or incumbrancer upon inquiry leading to the truth;[4] and lastly, such facts as would raise a conclusive presumption of law, that the party charged with notice had received the same.[5]

[1] Monroe *v.* Eastman, 31 Mich., 283; Wilson *v.* Hunter, 30 Ind., 466.

[2] Lead. Cas. in Eq., vol. II, part I, 148, 4th Am. ed.

[3] See *ante*, §§ 6, 7.

[4] *Ante*, §§ 11, 27. "Information, from whatever source derived, which would excite apprehension in an ordinary mind, and prompt a person of average prudence to make inquiry, would be sufficient." Bryant *v.* Booze, 55 Ga., 438; Swarthout *v.* Curtis, 5 N. Y., 301; Jackson *v.* Caldwell, 1 Cow., 622; Bunting *v.* Ricks, 2 Dev. & Batt., 130; Gibbs *v.* Cobb, 7 Rich. Eq., 54; Parish *v.* Brooks, 4 Brewst., 154; Hinde *v.* Vattier, 1 McLean, 110; 7 Pet., 252; Lawton *v.* Gordon, 37 Cal., 202; McLeod *v.* First Nat. Bank, 42 Miss., 99.

[5] *Ante*, ch. I, part II.

§ 65a. **Due Inquiry.**— But even when the notice is of this express character, it may fall short of that completeness that brings to the purchaser full knowledge of the adverse interest. It may only serve to put him upon inquiry, and if so, the *bona fides* of his purchase is to be determined by the diligence with which his inquiries were pursued in search of the truth.[1] The party may be required to consult the alleged prior vendor and the vendee,[2] but cannot rest content with this if the line of inquiry suggested can be better followed up with third persons.[3] When visible structures on the land seem to be in the possession of others than the vendor;[4] when the title deeds are not in the possession of the vendor, where it is customary or usual to find the muniments of title in the possession or under the control of owners,[5] the fact that a stranger is in

[1] Pell *v.* McElroy, 36 Cal., 268; O'Rourke *v.* O'Connor, 39 Cal., 442; Witter *v.* Dudley, 42 Ala., 616; Dutton *v.* Warschauer, 21 Cal., 609; Littleton *v.* Giddings, 47 Tex., 109; Briggs *v.* Taylor, 28 Vt., 180; Allen *v.* Poole, 54 Miss., 323; Wood *v.* Krebbs, 30 Gratt., 708; Cordova *v.* Hood, 17 Wall., 1; Bennett *v.* Buchan, 61 N. Y., 222; Bush *v.* Ware, 15 Pet., 93; Baker *v.* Bliss, 39 N. Y., 70; Kellogg *v.* Smith, 26 N. Y., 18; Helms *v.* Chadbourne, 45 Wis., 60; Reed *v.* Gannon, 50 N. Y., 345; Major *v.* Bukley, 51 Mo., 227; Russell *v.* Sweezey, 22 Mich., 235.

[2] Espin *v.* Pemberton, 3 De G. & J., 547.

[3] Hopgood *v.* Ernest, 3 De G., J. & S., 116; Ratcliffe *v.* Barnard, L. R., 6 Ch., 652; Broadbent *v.* Barlow, 3 De G., F. & J., 570; Maxfield *v.* Burton, L. R., 17 Eq., 15; Greenfield *v.* Edwards, 2 De G., J. & S., 582; Pitcher *v.* Rawlins, L. R., 11 Eq., 53; Cory *v.* Eyre, 1 De G., J. & S., 149; Briggs *v.* Jones, L. R., 10 Eq., 92; Hunt *v.* Elmes, 2 De G., F. & J., 578; Mullison's Estate, 68 Pa. St., 212.

[4] Hervey *v.* Smith, 22 Beav., 299; Morland *v.* Cook, L. R., 6 Eq., 252; Davies *v.* Sear, L. R., 7 Eq., 427; Allen *v.* Seckham, L. R., 11 Ch. D., 790; Suffield *v.* Brown, 9 Jur. (N. S.), 999; 33 L. J. Ch., 256; Ewart *v.* Cochrane, 4 Macq., 117; Clements *v.* Welles, L. R., 1 Eq., 200; Shackleton *v.* Sutcliffe, 1 De G. & Sm., 609; Pyer *v.* Carter, 1 H. & N., 916; Dann *v.* Spurrier, 7 Ves., 231; Wilson *v.* Hart, L. R., 1 Ch., 463; Grant *v.* Munt, Coop., 173; Bowles *v.* Round, 5 Ves., 508; Dyer *v.* Hargrave, 10 Ves., 506; Pope *v.* Garland, 4 Y. & C., Ex., 394.

[5] Jones *v.* Williams, 24 Beav., 47; Worthington *v.* Morgan, 16 Sim., 547; Allen *v.* Knight, 5 Hare, 272; Jackson *v.* Rowe, 2 S. & S., 472.

possession of the premises,[1] or other circumstance or information coming to the knowledge of the purchaser of an interest, right or claim adverse to that of his vendor,[2] are facts which put the purchaser upon inquiry. And a party who is thus put upon inquiry, and fails to prosecute such inquiry in a proper manner, will be conclusively presumed to have obtained all the information he might have acquired by diligence, and will be charged with absolute notice of any adverse interests such inquiry would have disclosed.[3]

§ 66. **Different Kinds of Notice.**—Among these different means of notice are *adverse possession*, which is considered as actual notice, and in some instances as constructive notice of the possessor's title or interest.[4] Notice from *title papers* also seems to have been considered as both actual and constructive.[5] *Lis pendens*, according to the accepted meaning of the term, is clearly notice only by the aid of legal presumption.[6] When the notice comes to the purchaser in the form of information from one who has actual knowledge of the prior title, it seems to stand with some courts

[1] Allen *v.* Anthony, 1 Meriv., 282; Holmes *v.* Powell, 8 De G., M. & G., 572; Hardy *v.* Reeves, 5 Ves., 426; Gordon *v.* Gordon, 3 Sw., 400; Norway *v.* Rowe, 19 Ves., 144; White *v.* Wakefield, 7 Sim., 401; Johnson *v.* Clarke, 18 Kans., 157; Miles *v.* Langley, 1 Russ. & My., 39; Oxwith *v.* Plummer, 2 Vern., 636; School Dist. *v.* Taylor, 19 Kans., 287; Noyes *v.* Hall, 97 U. S., 34; Tankard *v.* Tankard, 79 N. C., 654; Crabtree *v.* Breckenridge, 48 Ill., 91; Strickland *v.* Kirk, 51 Miss., 795; Moss *v.* Atkinson, 44 Cal., 3; Sears *v.* Munson, 23 Iowa, 380; Phillips *v.* Costley, 40 Ala., 486; Glidewell *v.* Spaugh, 26 Ind., 319; Bank of Orleans *v.* Flagg, 3 Barb. Ch., 316; Diehl *v.* Page, 3 N. J. Eq., 143; Baynard *v.* Norris, 5 Gill, 468; Mullins *v.* Wimberly, 50 Tex., 457.

[2] Shepardson *v.* Stevens, 71 Ill., 646; Buttrick *v.* Holden, 13 Metc., 355; Stearns *v.* Gage, 79 N. Y., 102; Buck *v.* Paine, 50 Miss., 648.

[3] Gouverneur *v.* Lynch, 2 Paige, 300; Brice *v.* Brice, 5 Barb., 533; Tutle *v.* Jackson, 6 Wend., 213; McLaughlin *v.* Shepherd, 32 Me., 143; Hanly *v.* Morse, 32 Me., 287; Burt *v.* Cassety, 12 Ala., 739; Scroggins *v.* Dougal, 8 Ala., 382; Brush *v.* Halloway, 2 J. J. Marsh., 180.

[4] *Post*, ch. IV.

[5] *Post*, ch. V.

[6] *Post*, ch. VI.

upon nearly the same footing as actual knowledge brought home to the person to be charged. Indeed there seems no good reason why one should not purchase at his peril, in the face of such information, regardless of whether it comes from a party in interest, or one who tenders gratuitous advice, provided he be one who *knows* or professes to know whereof he speaks.[1]

§ 67. **Purchasers of Chattels.**—The general doctrine by which purchasers of real estate are affected with notice of prior unregistered instruments affecting the title, or of prior equities, applies in substantially the same manner and to the same extent to purchasers of chattels in the possession of the vendor at the time of the sale. That is, when the purchase is made *bona fide* from one who has the legal title, or who has been clothed by the owner with all the *indicia* of ownership or authority to sell, the purchaser would be protected.[2] But if the purchase be made with notice of title or interest in another, or with a knowledge of such circumstances as would suffice to put him upon inquiry leading to actual knowledge of such interest, his purchase would be fraudulent as against the true owner, and he would not be permitted to profit by it.[3]

§ 68. **Innocent Pledgee.**—The case of Crocker *v.* Crocker[4] is an illustration of both propositions in the next preceding section. There the plaintiff being indebted to a corporation on account of unpaid assessments on shares of

[1] Lawton *v.* Gordon, 37 Cal., 202.

[2] Saltus *v.* Everett, 20 Wend., 267; Crocker *v.* Crocker, 31 N. Y., 507; Western Trans. Co. *v.* Marshall, 37 Barb., 509; Parker *v.* Middlebrook, 24 Conn., 207.

[3] Crocker *v.* Crocker, 31 N. Y., 507; Wooster *v.* Sherwood, 25 N. Y., 278; Ploughboy, 1 Gall., 41; McAnelly *v.* Chapman, 18 Tex., 198. In general, in order to affect subsequent purchasers of chattels, or creditors of the seller, with notice of the prior sale, there must be an open and unequivocal change of possession from the seller to the prior purchaser. Bishop *v.* O'Connell, 56 Mo., 159; Claflin *v.* Rosenberg, 42 Mo., 439; Lesem *v.* Herriford, 44 Mo., 323.

[4] 31 N. Y., 507.

its stock, and being a creditor of the corporation to an amount almost equal to the amount of his unpaid assessments, it was agreed that upon a sale of his stock for what remained unpaid he was to receive credit for the amount due him, and then pay in the balance. In pursuance of this arrangement, defendant, who was plaintiff's brother, at the instance and request of plaintiff, attended the sale and bid in the stock, but was only required to pay the amount remaining after the deduction of the amount due plaintiff from the corporation. The legal title was vested in the defendant, who had all the *indicia* of absolute ownership; but as between himself and brother he held as trustee for the latter. It was also held that he had no title or interest which he could convey to a purchaser with notice of the trust, so as to divest the beneficial interest of his *cestui que trust;* but where one who had neither actual nor constructive notice of such interest received certain shares of such stock in pledge from the trustee, parting with value therefor, and taking the same in the honest belief that they were the property of such trustee, the innocent party who was thus misled by the fraudulent acts of the trusted agent of the plaintiff was entitled to protection in his possession of the stock.

§ 69. Mere Possession Not Conclusive Evidence of Title.— The case of Wooster *v.* Sherwood[1] was where the subject of the sale was a quantity of barley in a brewery. The vendor afterwards sold the brewery and contents, giving notice to the purchaser of the specific quantity of barley to which plaintiff was entitled. This passed no title to any portion of plaintiff's barley to the purchaser of the brewery, and a sale and delivery of the same, by the latter, to an innocent purchaser for value, was held equally invalid to divest plaintiff's title, for the reason that the vendor had not been clothed by plaintiff with any apparent authority to sell, or any power to exercise control over the property.

[1] 25 N. Y., 278.

§ 70. Secret Instructions to Broker.—It has been elsewhere held that where one purchased goods and chattels and had them transferred to a broker whose business it was to sell such merchandise, and the broker was authorized by the owner to assume the apparent right to dispose of the property in the ordinary course of trade, the secret instructions to the broker would not affect the rights of a purchaser who had no notice of them.[1]

§ 71. Secret Lien.—In Western Transportation Company *v.* Marshall,[2] the sale was of a quantity of grain, which the court held had been duly delivered by plaintiff on board defendant's ship, accompanied by such written *indicia* as, together with the possession of the grain, would lead others to believe that the purchaser was the owner. Under these circumstances it was held that one who purchased without notice of the non-payment of the purchase money, which, according to the contract, was to be paid on delivery, and the grain having been in the possession of the first purchaser for four days, was a *bona fide* purchaser and within the protection of the law. But the learned judge, in rendering the opinion in this case, goes to the extent of declaring that "where the owner voluntarily delivers the possession of merchandise to a vendor, subsequent *bona fide* purchasers from such vendor, and those incurring liabilities and making advances on the faith of such possession, or standing in the relation of *bona fide* purchasers, are entitled to protection against the claims of the former owner, *although the sale be conditional* and the purchase price not paid."

§ 72. Conditional Sales.—While it may be true, as it seems to have been held in the case last cited, that a sale may be absolute, although the terms of payment are not complied with by the purchaser; and that the subsequent vendee, without notice of such non-compliance, will be protected as an innocent purchaser, the doctrine has been established by

[1] Pickering *v.* Busk, 15 East, 38.

[2] 37 Barb., 509.

a long line of decisions, that where the sale is *conditional*, in the sense that the property in the chattels is not to pass until the performance of the conditions, the mere surrendering of possession to the conditional vendee will not amount to such apparent authority to dispose of the goods as will enable him to give to a purchaser a title superior to that by which he held. In other words, until the goods are paid for (if that be the condition), they belong to the original owner, and although the purchaser from the conditional vendee should take without notice of the absence of title in his vendor, the owner may reclaim the goods.[1]

§ **73. Pledge.**—So where property has been deposited with a person as a pledge to secure the payment of a sum of money in the future, or to answer for the depositor's default in the performance of some other act of pecuniary benefit to the pledgee, the contract between the parties will govern as to the character of the pledgee's possession; and should he transfer such possession to another, and attempt at the same time to transfer the title, his act, being in contravention of the terms of the contract, would be nugatory, so far as it affected the pledgor's right to redeem, although the person to whom the transfer was made had no notice of the owner's claim or title.[2] In the case cited, the pledge was of certificates of shares of stock, to which were attached a blank power of attorney, authorizing the attorney to sell the stock. Notwithstanding that the pledgee, in violation of the terms of the contract, by filling out the power of attorney, clothed himself with the apparent *jus disponendi*, it

[1] Clark *v.* Wells, 45 Vt., 4; Hotchkiss *v.* Hunt, 49 Me., 213; Crocker *v.* Gullifer, 44 Me., 491; Hart *v.* Carpenter, 24 Conn., 427; Forbes *v.* Marsh, 15 Conn., 384; Morris *v.* Rexford, 18 N. Y., 552; Strong *v.* Taylor, 2 Hill (N. Y.), 326; Riddle *v.* Coborn, 8 Gray, 241; Barrett *v.* Pritchard, 2 Pick., 512; Whitwell *v.* Vincent, 4 Pick., 449; Price *v.* Jones, 3 Head, 84; Fifield *v.* Elmer, 25 Mich., 48; Dunbar *v.* Rawles, 28 Ind., 225; Baker *v.* Hall, 15 Ia., 277; Griffin *v.* Pugh, 44 Mo., 326; Little *v.* Page, id., 412; West J. R. R. Co. *v.* Trenton Car Works Co., 32 N. J. L., 515; Morrill *v.* Moulton, 40 Vt., 242; Johnson *v.* Powers, id., 611.

[2] McNeil *v.* Tenth Nat'l Bank, 55 Barb., 59.

was held that this did not authorize him to sell without complying with the legal requirements in case of the sale of a pledge, such as notice to, and demand of, the pledgor; and a sale to an innocent purchaser in fraud of the rights of the pledgor would not divest the title of the latter.[1]

§ 74. **Condition May be by Parol.**— The case of Clark *v.* Wells[2] was where a coach had been left with a mechanic for repair, and he supplied new wheels to the vehicle, which were by parol agreement to remain his property until paid for. Before paying for them, however, the owner sold the coach to an innocent purchaser, who resold it to another; and although neither had notice of the mechanic's claim to the wheels, it was held that in the absence of evidence showing *laches* on his part, he might reclaim them from the last purchaser.

§ 75. **Property Reclaimed in an Altered State.**— Another example of the effect given to conditional sales, where uninformed purchasers or creditors would be least likely to suspect the property and the possession to be in different persons, is the case of Barret *v.* Pritchard.[3] There the claimant had sold wool to a manufacturer, upon condition that it was to be paid for in six months, and until paid for, whether it remained in its original condition, was manufactured, or in process of manufacture, into yarn or cloth, it should remain the property of the vendor. This was held to be a valid contract, and one which could be enforced by the conditional vendor, by reclamation of the property as against creditors without notice.

§ 76. **Caveat Emptor.**— While it is not denied that possession of personal property is *prima facie* evidence of ownership, it is quite evident from the foregoing authorities that, except where the statute interposes for the protection of innocent purchasers, such property may be held

[1] See, also, Ballard *v.* Burgett, 40 N. Y., 314.
[2] 45 Vt., 4.
[3] 2 Pick., 512.

subject to secret claims, and the title will be transferred subject to the doctrine of *caveat emptor*.[1]

§ 77. **Chattel Mortgages.**— The title to personal chattels is only affected by the registry laws, when the property is mortgaged, or conveyed in trust as security for the discharge of an obligation, for the benefit of the mortgagee or beneficiary mentioned in the deed of trust.[2] As respects the registry of chattel mortgages, and the effect of such registry as notice to subsequent purchasers and incumbrancers, the rules are substantially similar to those recognized where conveyances of real estate are in question. In some of the states, however, there is a difference in the effect of the registry of instruments affecting the titles to these different kinds of property, in this: That unregistered chattel mortgages are absolutely void, even as against subsequent purchasers or creditors with actual notice thereof. They differ from conveyances or incumbrances of real estate, for the reason that their validity depends as much upon their proper acknowledgment and registration as upon their execution and delivery.[3]

§ 78. **Possession of Chattels.**— What is elsewhere said concerning the doctrine of notice of prior claims to real estate, which comes from knowledge or information of the possession of the property by the adverse claimant, will apply with still greater force, so far as it favors such doctrine, to the possession of personal chattels.

§ 79. **Choses in Action.**— Choses in action which in equity, according to the law merchant, or under the favoring provisions of statute law, are assignable, occupy a posi-

[1] Parmlee *v.* Catherwood, 36 Mo., 479.

[2] Mueller *v.* Engeln, 12 Bush (Ky.), 441.

[3] But chattel mortgages will only be declared void as against subsequent purchasers *for value*. The provision of the statute requiring such instruments to be recorded, in order to give them priority over the claims of subsequent purchasers, is not intended for the benefit of those who have paid nothing. Kohl *v.* Lynn, 34 Mich., 360. The effect of recording a chattel mortgage, as notice to purchasers, will follow the chattels when removed to another state. Hall *v.* Pillow, 31 Ark., 32.

tion with reference to the question of notice essentially different from that occupied by any other species of property. When the subject of the transfer is not negotiable, according to the law merchant, the equities subsisting against it in the hands of the assignor follow it into the hands of the assignee, whether he has notice of such equities or not. Where the transfer of a non-negotiable security involves nothing further than a mere change of title, the purchaser is at once subrogated to all the rights, and assumes all the liabilities, attendant upon the ownership of the instrument.[1]

§ 80. **Negotiable Instruments.**— But respecting negotiable instruments, and their transfer, the purchaser occupies a more advantageous position than the purchaser of any other species of property. It is true that even he will be affected by notice of equities which would have defeated the security in whole or in part, in the hands of the original payee; but so favorable is the law to the facile transfer of negotiable paper, that it will not suffer its assignability to be obstructed by a merely technical notice to the purchaser that the obligor, as between himself and the obligee, has a defense to the demand. The notice of defenses to negotiable paper, to affect purchasers, must therefore be *actual* and not merely *constructive*, and must be of a higher degree than circumstances sufficient to put a man of ordinary prudence on inquiry.[2]

[1] Sanborn *v.* Little, 3 N. H., 539.

[2] Swift *v.* Tyson, 16 Pet., 1; Goodman *v.* Simonds, 20 How., 343; Bank of Pittsburgh *v.* Neal, 22 How., 96; Murray *v.* Lardner, 2 Wall., 110; Magee *v.* Badger, 34 N. Y., 247; Belmont Branch Bank *v.* Hodge, 35 N. Y., 65; Seybel *v.* Nat'l Cur. Bank, 54 N. Y., 288; Phelan *v.* Moss, 67 Penn. St., 59; Lake *v.* Reed, 29 Ia., 258; Worcester Co. Bank *v.* Dorchester Bank, 10 Cush., 488; Brush *v.* Scribner, 11 Conn., 388; Woolfolk *v.* Bank of America, 10 Bush, 504; Horton *v.* Bayne, 52 Mo., 531; Merrick *v.* Phillips, 58 Mo., 436; Hamilton *v.* Marks, 63 Mo., 167; Lawson *v.* Weston, 4 Esp., 56; Johnson *v.* Way, 4 Am. Law, 758; Morehead *v.* Gilmore, 77 Penn. St., 118; Peacock *v.* Rhodes, 2 Doug., 611; Crook *v.* Jadis, 5 Barn. & Ad., 909; Backhouse *v.* Harrison, 5 Barn. & Ad.,

§ 81. **Lost Bill.**— The doctrine laid down in the preceding section was substantially announced by Lord Kenyon in the early case of Lawson *v.* Weston,[1] where the question arose upon a lost bill, which had been discounted without actual notice of the rights of the original payee. It was sought to charge him with notice by proof that the loss was advertised, and payment stopped by notice to the drawee. As the bill came to the possession of the holder who had discounted it, without fraud on his part, the advertisement was held not sufficient to bind him. The earlier case of Miller *v.* Race[2] is cited in support of the same principle, but as that was decided with reference to a bank bill which circulated as cash, it could have no application in considering the question of notice as it affects commercial paper.

§ 82. **Holder Affected Only When Grossly Negligent.**— This doctrine was shaken for a time in England by a case in which it was decided that where one discounted a

1098; Goodman *v.* Harvey, 4 Ad. & El., 870; Uther *v.* Rich, 10 Ad. & El., 784; Arbouin *v.* Anderson, 1 Ad. & El. (N. S.), 498; Trieber *v.* Com'l Bank of St. Louis, 31 Ark., 128; Weit *v.* Thayer, 118 Mass., 473. An acceptor of a bill, accepted in blank, has been held chargeable with notice of any fraudulent use made of it. Kerr on Fraud & Mistake, 248; Hatch *v.* Searles, 24 L. J. Ch., 22; Sharp *v.* Arbuthnot, 13 Jur., 219. It is not every negotiable instrument that is protected as bills of exchange. The mere fact that they are negotiable, in the sense that the property in them passes by indorsement, does not seem to require actual notice, or notice so express that purchasers could not take them without gross and culpable negligence, to render them subject to the original defenses against them in the hands of such purchasers. This immunity is peculiar to instruments known to the law merchant as commercial paper. It is held not to apply to bills of lading, which are, by statute, negotiable "in the same manner as bills of exchange." And hence, where the purchaser of such a bill had reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, he was not regarded as a *bona fide* purchaser, nor entitled to hold the merchandise covered by the bill, against its true owner. Shaw *v.* Railroad Co., 101 U. S., 557.

[1] 4 Esp., 56.

[2] 1 Burr., 452.

bill which had been advertised as lost, in the ordinary course of his business, under circumstances which ought to have excited the suspicions of a prudent man, he was not entitled to recover against the indorser.[1] But in a subsequent case this uncertain and vague test was expressly repudiated, with the concurrence of all the judges of the court of king's bench, and it was held incumbent upon the drawer of an accommodation bill upon which suit was brought by the indorsee, in order to avail himself of the defense that the bill was fraudulently put in circulation, to show that the holder had been guilty of gross negligence.[2] This case was affirmed at the same term,[3] where the case of Gill *v.* Cubitt,[4] and others adhering to the doctrine there announced, were expressly overruled.

§ 83. Bad Faith Requisite to Defeat Holder's Rights.— In a still later case before the same court, the question of gross negligence was held proper for submission to the jury in a suit between the indorser for value of a bill of exchange and a prior party thereto; but it was given as the opinion of the court that this alone would not be a sufficient answer where the holder had given value for the bill. Bad faith on the part of the purchaser was regarded as an essential fact to be established by the defendant, and though gross negligence might be evidence of such bad faith, it did not amount to the same thing.[5] Subsequent English decisions have reaffirmed this doctrine, and it is now regarded as the settled law of England.[6]

§ 84. Purchaser Without Notice Protected.— In Swift *v.* Tyson,[7] the question of notice was not fairly at issue; but it was there laid down by Mr. Justice Story, as a general rule, that a purchaser of negotiable paper, in the

[1] Gill *v.* Cubitt, 3 Barn. & Cres., 466.
[2] Crook *v.* Jadis, 5 Barn. & Ad., 909.
[3] Backhouse *v.* Harrrison, id., 1098.
[4] *Supra.*
[5] Goodman *v.* Harvey, 4 Ad. & Ell., 870.
[6] *Supra*, § 80.
[7] 16 Pet., 1.

ordinary course of business and for a valuable consideration, without notice of facts which would impeach its validity between the antecedent parties, if he took it under an indorsement made before the same became due, held the title unaffected by these facts, and might recover thereon, although, as between the original parties, the transaction was without legal validity. This doctrine was there declared by the learned judge to be so long and so well established, and so essential to the security of negotiable paper, that it had been laid up among the fundamentals of the law, and no longer required argument or the citation of authority in its support.[1]

§ 85. **Same — Knowledge a Question of Fact.** — In citing the above case, and making copious quotations from the opinion of the learned judge, Mr. Justice CLIFFORD, in Goodman *v.* Simonds,[2] interprets the word *notice*, as there employed, to be the same as *knowledge*,[3] and deduces therefrom the rule that "Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defense. * * * And the question whether the party had such knowledge or not is a question of fact for the jury. * * * And the proper inquiry is, did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument?[4] And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen."[5]

[1] Swall *v.* Clarke, 51 Cal., 227.

[2] 20 How., 343.

[3] 20 How., 365.

[4] 20 How., 366.

[5] Knowledge of the infirmities of a bill or note coming to one of two partners in a private bank will be imputed to the partnership, so that the bank cannot be a *bona fide* holder of such paper. Stockdale *v.* Keyes, 79 Pa. St., 251.

§ 86. **Facts Which Excite Inquiry Held Inadmissible.**— In Woolfolk *v.* Bank of America,[1] Judge Pryor, in rendering the opinion of the court, says: "In a case like this, the defense must allege and prove a knowledge of the facts constituting the fraud on the part of the holder — that is, such facts as would satisfy one of ordinary prudence and judgment of the infirmity in the bill; and the evidence of such facts and circumstances on the part of the holder, as would lead to an inquiry by which only the facts constituting the fraud might be ascertained, is clearly inadmissible." The question of negligence, whether gross or otherwise, or diligence on the part of the purchaser, is here allowed to have no influence whatever, even as a fact or circumstance by which a participation in the fraudulent inception or circulation of the instrument might be established or disproved.

§ 87. **Circumstances Which Put Purchaser on His Guard.**— In Cone *v.* Baldwin,[2] which was an action by the purchasers of a negotiable note against the maker, it is conceded that the defendant was not bound to prove that the plaintiffs purchased with full and certain knowledge of the want or failure of consideration; but that if the circumstances attending the transfer were such as to put them upon their guard, they were bound to make inquiry; and that if they did not they purchased at their peril. Nevertheless, it was held in that case that the mere statement of the payee, in transferring the note by delivery to the plaintiffs, that they purchased at their own risk, was not a circumstance rendering it incumbent upon them to inquire into the consideration. The point conceded in this case may hardly be taken as a contradiction of the doctrine laid down in the cases previously cited; though the principle upon which those cases were determined has not passed unchallenged in this country.[3] It has not, however, met with sufficient opposition to change the current of authority,

[1] 10 Bush, 504.

[2] 12 Pick., 545. See, also, Goddard *v.* Lyman, 14 Pick., 268.

[3] Pringle *v.* Phillips, 5 Sand., 157; Hamilton *v.* Marks, 52 Mo., 78.

which has borne constantly in a direction favorable to purchasers of negotiable paper. One of the latest and best considered cases upon the subject presents the unusual feature of an entire change of view by the same court, not only in respect to a case involving the same question, but in deciding the same case. The judgment of the trial court had been reversed and the cause remanded. The case went up the second time with instructions given in accordance with the former ruling of the appellate court. The first decision of reversal was expressly overruled and the judgment again reversed.[1] Judge WAGNER, in rendering the opinion in this case, makes an able review of all the most important cases, both English and American, and justifies the departure of the court from the former ruling in the same case, upon principle as well as authority; there having been several cases decided subsequent to the first hearing in Hamilton *v.* Marks, where a doctrine was announced inconsistent with that under review, although the case was not expressly overruled.[2] The conclusion reached by the learned judge is certainly in harmony with the views expressed by the courts of last resort of the principal commercial states of the Union as well as the supreme court of the United States.[3]

[1] Hamilton *v.* Marks, 63 Mo., 167. But in Payne *v.* Flournoy, 29 Ark., 500, it is held that it appearing from the note that it was made payable to an executrix in her representative capacity, was notice that it was assets in her hands.

[2] Horton *v.* Bayne, 52 Mo., 531; Corby *v.* Butler, 55 Mo., 398; Merrick *v.* Phillips, 58 Mo., 436.

[3] The rule is quite general, so far as the number of authorities go, that one whose name appears only on the back of a note will be regarded *prima facie* as a maker. 1 Dan'l on Negot. Inst., § 713*a*. Citing Rey *v.* Simpson, 22 How., 241; Good *v.* Martin, 95 U. S., 95; Sylvester *v.* Downer, 20 Vt., 355; Union Bank *v.* Willis, 8 Metc. (Mass.), 504; Draper *v.* Weld, 13 Gray, 580; Hawkes *v.* Phillips, 7 Gray, 284; Woods *v.* Woods, 127 Mass., 141; National Pemberton Bank *v.* Longee, 108 Mass., 371; Perkins *v.* Barstow, 9 R. I., 507; Baker *v.* Robinson, 63 N. C., 191; Robinson *v.* Bartlett, 11 Minn., 410; Massey *v.* Turner, 2 Houst., 79; Weatherwax *v.* Paine, 2 Mich., 555; Rotschild *v.* Grix, 31 Mich., 150; Herbage *v.* McEntee, 40 Mich., 337; Sibley *v.* Mus-

§ 88. **Bad Faith an Inference of Fact.**—There seems to be a peculiarity common to nearly all the cases in which this question of notice is raised. The inference of notice which is sought to be drawn from circumstances sufficient to put a prudent man upon inquiry is one of *law* and not of *fact.* The only question submitted to the jury by the objectionable instruction is whether there existed such circumstances, and from these, if found, the court is asked to instruct the jury that the legal inference of notice follows. It is frequently asserted in those cases requiring actual notice of the facts urged by the maker or drawer of negotiable paper, that the question of knowledge or notice is one of fact; and it is difficult to imagine an issuable fact which is not susceptible of proof by the evidence of circumstances. It may, therefore, be fairly deduced from the authorities, that whatever is sufficient to satisfy the jury that the purchaser took the security in bad faith, or that he was wilfully blind to the circumstances impeaching its validity, will warrant the inference that he had actual notice of the facts.[1] This

kegan N. B., 41 Mich., 196; Moynahan *v.* Hanford, 42 Mich., 330; Childs *v.* Wyman, 44 Me., 433; Martin *v.* Boyd, 11 N. H., 385; Carpenter *v.* Oaks, 10 Rich., 17; Peckham *v.* Gilman, 7 Minn., 449; McComb *v.* Thompson, 2 Minn., 139; Schley *v.* Merrit, 37 Md., 352; Norris *v.* Despard, 38 Md., 491; Walz *v.* Alback, 37 Md., 404; Ives *v.* Bosley, 35 Md., 262; Third N. B. *v.* Lange, 51 Md., 138; Barr *v.* Mitchell, 7 Oreg., 346; City N. B. *v.* Goodrich, 3 Col., 137; Best *v.* Hoppie, 3 Col., 139; Nathan *v.* Sloan, 34 Ark., 524; Houghton *v.* Ely, 26 Wis., 181; Commonwealth *v.* Powell, 11 Gratt., 828; Douglas *v.* Scott, 8 Leigh, 43; Watson *v.* Hurt, 6 Gratt., 633; Orrick *v.* Colston, 7 Gratt., 189; Woodward *v.* Foster, 18 Gratt., 213; Mammon *v.* Hartman, 51 Mo., 168. And in Missouri it is held that such an indorser may be so held by an innocent purchaser before maturity, who has caused such note to be protested for non-payment and notice to be given to the indorser, as such protest and notice are not competent evidence of notice of an agreement between the payee and the *prima facie* maker, that the latter should only be held as an accommodation indorser. Chaffee *v.* Memphis, etc., R. Co., 64 Mo., 193.

[1] Packwood *v.* Gridley, 39 Ill., 388; Buckner *v.* Jones, 1 Mo. App., 538; Edwards *v.* Thomas, 2 id., 282; Clerks' Savings Bank *v.* Thomas, id., 367. In this connection, the case of Cass County *v.* Greene (66 Mo., 498)

rule does not involve the vagueness and uncertainty of the doctrine so often insisted upon, and, as we have seen, so generally repudiated, that the purchaser of negotiable securities is to be charged with notice of their latent infirmities merely by the existence of circumstances sufficient, in the opinion of the jury, to put a man of ordinary prudence upon inquiry.

is a noteworthy example. This was a proceeding by injunction to prevent the negotiation of certain fraudulently issued bonds in the hands of defendant, who claimed to be an innocent purchaser for value before maturity. The court, in affirming the decree enjoining the transfer of the bonds, based its judgment upon the ground that defendant had *actual notice* of the infirmities of the bonds, though there was no evidence of such actual notice other than the inferences to be drawn from the conduct of defendant, and his opportunities for arriving at a knowledge of the facts. Defendant was not the first purchaser, and sought to shelter himself under the absence of notice, both to himself and to the first purchaser. But the facts and circumstances from which notice to the defendant was inferred pointed with even more unmistakable directness to the first purchaser, as having notice of the fraud with which the securities were tainted. The bonds were first purchased from one of the persons originally concerned in their fraudulent issue, by a banking copartnership, and the notice imputed to the firm was shown by purely circumstantial evidence to have been communicated to one of its members. The decision in this case was held not to be in conflict with the adjudication of the same question, last theretofore made by the same court, where it was held, in substance, that facts and circumstances coming to the knowledge of a purchaser for value of negotiable paper, sufficient to put a man of ordinary prudence upon inquiry, would not suffice to affect the paper in his hands if purchased before maturity. Hamilton *v.* Marks, 63 Mo., 167; *supra*, § 87. Though the facts and circumstances relied on in this case were such as would tend to put a purchaser upon inquiry, and the defendant testified to his want of knowledge prior to his purchase, the inference drawn from the circumstances was that, as a matter of fact, he had received notice when he made the purchase of the bonds. To prove notice or knowledge in a case of this kind does not require evidence of a higher character than what would be sufficient to establish any other disputed fact. In transactions of this kind, where the *onus* of showing good faith is cast upon the purchaser of negotiable paper, it will not be sufficient for him to show that he did not *know* of the infirmities of the paper so long as it appears that he *believed* in their existence. And the fact of such belief might readily be inferred from evidence that he *had reason so to believe.*

§ 89. **Stolen Securities — Avoidance of Knowledge.**— In one of the later cases where this question was examined by the commissioner of appeals of the state of New York, in commenting upon the error of the trial court in excluding evidence which, it was alleged, tended to prove good faith on the part of the purchaser, undue weight seems to have been given to what might be, in cases disclosing parallel facts, a wilful avoidance of the knowledge which, if communicated, would have rendered the purchase an act of bad faith.[1] There printed notices of the larceny of certain negotiable securities were left at the place of business of the banking corporation sought to be charged, prior to the purchase of the stolen securities, and one of the excuses deemed admissible in evidence, for the utter disregard of such notices by the officers of the bank, was that the exigencies of their business were such, and their dealings in such securities so extensive, that the time could not be spared to read and record the large number of such notices left at their place of business, warning them of the stealing of similar securities. The exigencies of one's own business, when adopted by him, as an absolute standard by which his duty to others is to be measured, seems fraught with danger to all honest people except the one who adopts it. A banking institution in the city of New York, understood to be dealing so largely in negotiable securities that its officers were justified in ignoring all warnings with respect to stolen securities, would be able to offer absolute security to thieves.

§ 90. **Inquiry Excited by Inspection of Paper.**— The principle upon which knowledge or information of facts merely sufficient to put the party upon inquiry may be ignored has no application where the knowledge is derived from an inspection of the instrument itself, and points directly to a defect which requires explanation from the holder.[2] Neither does it apply where the inquiry excited by circumstances may be prosecuted to knowledge, by an

[1] Seybel *v.* Nat. Cur. B'k, 54 N. Y., 288.

[2] Ayer *v.* Hutchins, 4 Mass., 370; Hall *v.* Hale, 8 Conn., 336.

inspection of the instrument. As where the purchaser has knowledge of facts showing that certain securities have been lost by the holder, or that he has been fraudulently deprived of the possession thereof, and the facts of which he has knowledge include a description of the lost instruments, by numbers or other distinguishing marks; here inquiry may be said to be necessary in order to identify an instrument of the general character of those lost or stolen which may be offered him as one of the missing securities. The inquiry, however, need extend no further than the face of the instrument; but if it falls short of this, he purchases at his peril.[1]

§ 91. **When General Notice Sufficient.**— In Craft's Appeal,[2] two kinds of notice are recognized as sufficient to affect purchasers of negotiable paper, transferred before due. These are styled "particular or explicit," and "general or implied," corresponding substantially to our classification of express and implied.[3] And it is there held that a wilful or fraudulent failure to inquire into circumstances known to be such as to invite inquiry would warrant the jury, if they believed from the evidence that such abstinence was from the belief that inquiry would result in finding the note invalid, in regarding it as a case of general notice. And though mere negligence, however gross it may be, is not regarded as amounting to wilful or fraudulent blindness, it is mentioned as proper for submission to the jury in connection with other circumstances tending to prove such general notice; but if, notwithstanding the absence of such caution and prudence in making the purchase as should be exercised in the ordinary affairs of life, the transaction was honest on the part of the purchaser, and in the regular course of his business, he will hold the paper discharged of prior equities.[4]

[1] Howry *v.* Eppinger, 34 Mich., 29; Craft's Appeal, 42 Conn., 146; Buckner *v.* Jones, 1 Mo. App., 538.

[2] 42 Conn., 146.

[3] *Ante*, § 5 *et seq.*

[4] Swall *v.* Clarke, 51 Cal., 227.

§ 92. Suspicious Circumstances.— But the circumstances by which it is sought to prove that a purchaser of negotiable paper took with knowledge of equities between the original parties must be of a character in themselves suspicious. The inquiry excited must have reference to some matter affecting the validity of the instrument. It will not be sufficient that the circumstances attending the transaction, or even the memoranda on the paper itself, are unusual or extraordinary. Unless they direct attention to some infirmity of the instrument, it will be safe for the indorser to disregard them. Accordingly, where a note contained the memorandum, "secured by mortgage," this was held not sufficient to put a purchaser upon inquiry, nor to charge him with notice of the contents of such mortgage. And the mere fact that the mortgagee mentioned in the mortgage by which the note was secured was a different person from the payee of note was held insufficient to make it the duty of the purchaser to inquire as to the validity of the note.[1]

§ 92a. The Time When Notice Must be Acquired to Affect Purchasers.— The notice or knowledge of defects in the instrument, or frauds practiced, which tend to defeat the purchaser's rights, must be acquired prior to or at the time of the purchase.[2] The time of the purchase is determined not so much by the date of the contract of purchase as that of payment. Payment of the agreed price is a necessary completion of the contract, before notice is received, to render it a purchase for value and without notice.[3]

§ 93. Payment Before and After Notice.— The protection afforded to purchasers of negotiable instruments before maturity is intended to benefit those who have not only acted in good faith and without notice of the infirmities

[1] Howrey *v.* Eppinger, 34 Mich., 29.

[2] Hanauer *v.* Doane, 12 Wall., 342; Kasson *v.* Smith, 8 Wend., 437; Fisher *v.* Leland, 4 Cush., 456; Skilding *v.* Warren, 15 Johns., 270; Norvell *v.* Hudgins, 4 Munf., 496; Ryland *v.* Brown, 2 Head, 270; Harrisburg Bank *v.* Meyer, 6 Serg. & R., 537.

[3] Crandell *v.* Vickery, 45 Barb., 156.

affecting the instrument in the hands of the original payee, but have paid value therefor. One who has paid nothing prior to notice would not be protected in his purchase, and if a partial payment is made, the protection will only extend to the amount actually paid prior to notice, and as to that paid subsequently he will be treated as a purchaser *mala fide*.[1] And if notice is received after a partial payment, the protection only goes to the extent of the *bona fide* payment. As to so much of the consideration as is paid after notice, the purchaser will be regarded as a holder in bad faith.[2]

§ 94. Patent Defects Affecting Purchasers.— Cases are frequently cited in support of the application, to negotiable instruments, of the doctrine of implied notice, which upon examination appear to be inapplicable, for the reason that the matters therein set up in defense, and which are supposed to challenge inquiry, are apparent on the face of the instruments, and if unexplained utterly destroy their negotiability.[3] A note or bill payable to bearer, or to the order of the payee therein named, after it has been dishonored, can no more be protected in the hands of a subsequent purchaser as negotiable paper transferred before maturity, than though it had never contained words of negotiability.[4] Therefore, if such an instrument appears on its face to have been dishonored by non-payment or non-acceptance, it drops out of its place as a negotiable instrument protected by the law merchant, and so far from its being necessary to bring a knowledge of its latent defects home to the purchaser, in order to charge him, he is bound by the equities subsisting between the original parties without any notice at all.[5]

[1] Haescig *v.* Brown, 34 Mich., 503; Cass County *v.* Green, *supra*, § 88, note.

[2] Dresser *v.* Misso., etc., R. Co., 93 U. S., 93; Weaver *v.* Borden, 49 N. Y., 286.

[3] Hall *v.* Hale, 8 Conn., 336; Crossly *v.* Ham, 13 East, 498.

[4] 1 Daniel, Negot. Inst., 593; Andrews *v.* Pond, 13 Pet., 65; Angle *v.* N. W., etc., Ins. Co., 92 U. S., 341; Goodman *v.* Harvey, 4 Ad. & El., 870; Fowler *v.* Brantley, 14 Pet., 318; Swift *v.* Smith, 102 U. S., 442.

[5] Fowler *v.* Brantley, 14 Pet., 318.

§ 94a. Notice of Want or Failure of Consideration.— One of the defenses which the maker of a note, whether negotiable or not, may set up to an action by the payee, is want of consideration,[1] or failure of consideration either in whole or in part.[2] It follows that in a proper case of notice of such want or failure, the same defense may be made when the action is by an indorsee.[3] But the fact of which the purchaser is notified must be of something more than that the consideration was some particular commodity, unless it be an illegal consideration, or one which is inherently insufficient to support the contract between the parties. The mere fact that the consideration is particularly described in the note or bill does not impose upon the purchaser the duty of inquiring into the circumstances of its actual delivery to the maker, its value, or conformity to the terms of any warranty that may have been given by the payee.[4] Thus in Michigan it was held that the fact appearing upon the face of the note, that it was given for a patent right, would not put the purchaser upon inquiry, and charge him with notice of any fraud practiced upon the maker by the vendor of such right.[5] And in New York, that where it was stated on the face of the note that the article for which the note was given was warranted, would not authorize the inference that the purchase was made with notice of the breach of such warranty.[6] If, however, the purchaser has notice that the note was given in consideration of an

[1] Murphy *v.* Keyes, 39 N. Y. Sup. Ct., 18; Spurgin *v.* McPheeters, 42 Ind., 527.

[2] Dickinson *v.* Hall, 14 Pick., 217; Drew *v.* Towle, 27 N. H., 412; 1 Dan'l on Negot. Inst., § 203.

[3] Rand *v.* State, 77 N. C., 175; Dogan *v.* Dubois, 2 Rich. Eq., 85; Lenheim *v.* Fay, 27 Mich., 70; Coffman *v.* Wilson, 2 Met. (Ky.), 542.

[4] Borden *v.* Clark, 26 Mich., 410; Sackett *v.* Kellar, 22 Ohio St., 554; Beardslee *v.* Horton, 3 Mich., 560; Loomis *v.* Monry, 15 N. Y. (S. C.), 312; Doherty *v.* Perry, 38 Ind., 15; Miller *v.* Finley, 26 Mich., 255; Haskell *v.* Jones, 86 Pa. St., 173. *Contra*, Thrall *v.* Horton, 44 Vt., 386. See, also, Rand *v.* State, 77 N. C., 175.

[5] Miller *v.* Finley, 26 Mich., 255.

[6] Loomis *v.* Monry, 15 N. Y. (S. C.), 312.

executory contract, and that there has been a breach of the contract on the part of the payee, the purchaser cannot recover.[1] But it is held otherwise, if the notice goes no farther than the fact that the contract of which the note was the consideration was executory; for the obvious reason that the presumption would be that its terms had been, or would be, carried out in good faith, rather than that there had been a breach by the contractor.[2]

The doctrine that notice of want of consideration between the original parties will defeat the action of the purchaser does not apply to accommodation paper. The very nature of the transaction excludes any such defenses. Its purpose is much the same as a letter of credit from the maker, and to admit the defense of want of consideration against a purchaser would be to defeat the very object for which it was issued.[3] But the exemption of the holder of accommodation paper does not extend its protection to matters that are in violation of the terms upon which the maker executed the same. If the purchase is made with notice of any such violation of the terms of the original contract, the accommodation maker or indorser cannot be held liable to the purchaser.[4]

§ 94b. Notice of Diversion of Accommodation Paper.— Such a violation of contract is the diversion of the paper from the original purpose for which it was issued, particularly if the accommodation maker or indorser were

[1] Bowman *v.* Van Kuren, 29 Wis., 218; Wagner *v.* Diedrich, 50 Mo., 484.

[2] Patten *v.* Gleason, 106 Mass., 439: Bend *v.* Weitze, 12 Wis., 611; Davis *v.* McCready, 17 N. Y., 280; Croix *v.* Sibbett, 15 Pa. St., 238.

[3] Thatcher *v.* West River Nat. Bank, 19 Mich., 196; Grant *v.* Ellicott, 7 Wend., 227; Powell *v.* Waters, 17 Johns., 176; Grandin *v.* Leroy, 2 Paige, 509; Bank of Ireland *v.* Beresford, 6 Dow., 237; Jones *v.* Berryhill, 25 Iowa, 289; Stephens *v.* Monongahela Nat. B'k, 87 Pa. St., 163; Crouise *v.* Kellogg, 20 Ill., 11; Mentross *v.* Clark, 2 Sandf., 115.

[4] Daggett *v.* Whiting, 35 Conn., 372; Small *v.* Smith, 1 Den., 583; Hickerson *v.* Raignell, 2 Heisk., 329; Fetters *v.* Muncie Nat. B'k, 34 Ind., 251; Hidden *v.* Bishop, 5 R. I., 29; Roberts *v.* Eden, 1 Bos. & Pull., 398; Key *v.* Flint, 8 Taunt., 21; Lord *v.* Ocean Bank, 20 Pa. St., 384.

interested, directly or indirectly, in having that purpose carried into effect.[1] But such diversion must be in respect to some substantial matter, and not a mere variance in the mode of accomplishing the same result. Thus, if a note is made to enable the party who is to put it into circulation to raise money by discounting it at a particular bank, it is not a fraudulent diversion from the original design to have it discounted at a different bank, or used for the payment of a debt, where there is no fraud, and the interest of the accommodating party is not thereby prejudiced.[2] Where an accommodation note was made for the specific purpose of purchasing property upon which the accommodation party was to have a mortgage, and, contrary to the agreement, traded the note for similar property to another party, it was held that the latter could recover from the accommodation party, although he knew that the note was designed to be used in the purchase of the other property, but did not know that it was to be mortgaged.[3] When, however, the party giving the accommodation has a direct interest in having it used for the particular purpose for which it was designed; as where it is to take up notes at a bank where it is to be discounted, upon which notes the accommodation party is liable, a failure to use it in that manner and for the purpose agreed upon is a misappropriation or diversion.[4]

[1] Thompson *v.* Posten, 1 Duvall, 415; Evans *v.* Kymer, 1 Barn. & Ad., 528; Buchanan *v.* Findlay, 9 Barn. & Cres., 738; *supra*, § 94*a*.

[2] Daniel on Negot. Inst., § 792; citing Duncan & Sherman *v.* Gilbert, 29 N. J. L., 521; Jackson *v.* First Nat. B'k, 42 N. J. L., 178; Briggs *v.* Boyd, 37 Vt., 538; Purchase *v.* Mattison, 6 Duer, 587; Wardell *v.* Howell, 9 Wend., 170; Mohawk Bank *v.* Corey, 1 Hill, 513; Powell *v.* Waters, 17 Johns., 176; Bank of Chenango *v.* Hyde, 4 Cow., 567; Schepp *v.* Carpenter, 51 N. Y., 602; Reed *v.* Trentman, 53 Ind., 438; Brooks *v.* Hey, 23 Hun, 372; 1 Daniel on Negot. Inst., § 793*a*, citing Quinn *v.* Hard, 43 Vt., 375; Fetters *v.* Muncie Nat. B'k, 34 Ind., 254; Dunn *v.* Weston, 71 Me., 270; Kimbro *v.* Lytle, 10 Yerg., 417; Rutland Bank *v.* Buck, 5 Wend., 66; Dawson *v.* Goodyear, 43 Conn., 548; but see Merchants' Nat. B'k *v.* Comstock, 55 N. Y., 24.

[3] Laub *v.* Rudd, 37 Iowa, 618.

[4] Wardell *v.* Howell, 9 Wend., 170; Kasson *v.* Smith, 8 Wend., 437; Moore *v.* Ryder, 65 N. Y., 440; Comstock *v.* Hier, 73 N. Y., 269; Denniston *v.* Bacon, 10 Johns., 198.

There is little or no conflict of authority upon the proposition that, when there is a substantial diversion or misappropriation of paper of this character from its agreed purpose, the purchaser thereof with notice of the agreement and the breach will hold it subject to the accommodation party's defense on this ground. But there seems some conflict as to the effect of such misappropriation on the burden of proof. In New York it is held that the diversion is a fraud upon the accommodation party, and shifts the burden of proof upon the purchaser, requiring him to show that he was a purchaser in good faith, and in the ordinary course of business for a valuable consideration.[1] On the other hand, it is maintained that when such a defense is made, it rests with the accommodation party to show not only a substantial diversion, but that the same was known to the holder at the time of his purchase.[2]

[1] Wardell *v.* Howell, 9 Wend., 170; Farmers', etc., Nat'l B'k *v.* Noxon, 45 N. Y., 762; Spencer *v.* Ballou, 18 N. Y., 331; Grocers' Bank *v.* Penfield, 7 Hun, 279.

[2] Clark *v.* Thayer, 105 Mass., 216; Stoddard *v.* Kimball, 6 Cush., 469; Robertson *v.* Williamson, 5 Munf., 331; Dunn *v.* Weston, 71 Me., 270; Gray *v.* Bank of Ky., 29 Pa. St., 365; Holme *v.* Kansper, 5 Binn., 469; 1 Dan'l on Negot. Inst., § 814.

CHAPTER III.

NOTICE BY REGISTRATION OF INSTRUMENTS.

I. The General Scope and Operation of the Statute.
II. Recordable Instruments.
III. Statutory Prerequisites to Recording.
IV. Errors in the Record.
V. Errors by the Party Filing the Instrument.
VI. Conflicting Titles Affected by Priority of Registration.
VII. Other Notice Considered in Connection With Registration.

I. The General Scope and Operation of the Statute.

§ 95. Registry Provided for by Statute.
96. Object of American Registry Acts.
97. Registration Notice to Subsequent Purchasers.
98. To Affect Purchasers Must be Properly of Record.
99. Prerequisite to Registration.
100. Subscribing Witnesses.
101. When Instrument to be Filed.
102. Consequence of Delay in Filing.
103. Exceptional Legislation.
104. English and Irish Registry Acts.
105. Equitable Mortgage.
106. Registry of Marriage Settlement.
107. Irish Act.
108. Registered Mortgage and Unregistered Will.
109. Registered Legal Mortgage and Unregistered Equitable Mortgage.
110. Memorandum of Further Charge.
111. Agreement to Mortgage.
112. Acknowledgment.

§ 95. Registry Provided for by Statute.— The registry of instruments affecting the title to property, being provided for entirely by legislative enactment, can only be treated with reference to its effect as *notice* by giving as near as may be the judicial construction placed upon the different statutes. This could, no doubt, be more thoroughly accomplished by copying each statute *in extenso*, and then giving

the decisions under them. But this course would involve the necessity of extending this treatise to an unwarranted length for the doubtful benefit of presenting a body of statute law which might be undergoing changes while the work was passing through the press. The most that can be safely undertaken in this direction is to present some of the most striking points of difference in the recording acts of the different states of the Union. Those of Great Britain are so essentially different in their scope and administration, that, for a practical work upon a subordinate branch of the law, it could hardly be profitable to compare them in detail with the acts of our own legislative bodies.

§ 96. **Object of American Registry Acts.**—The general spirit and object of the different American registry acts are substantially the same. They are intended to furnish the best and most easily accessible evidence of the titles to real estate, to the end that those desiring to purchase may be fully informed of instruments of prior date, affecting the subject of their contemplated purchases. And also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security, provided they do so without knowledge, information or such suggestions from other facts as would be gross negligence to ignore, of some antecedent conveyance or equitable claim.[1] But in order that the subsequent purchaser may be able to maintain the superiority of his title as against the prior purchaser, who has failed to deposit his deed for rec-

[1] See Brooks' Appeal, 64 Pa. St., 127; Bratton's Appeal, 8 Pa. St., 164; Foster's Appeal, 3 Pa. St., 79; Dungan *v.* Am., etc., Ins. Co., 52 Pa. St., 253; Ebner *v.* Goundis, 5 Watts & S., 49; Cover *v.* Black, 1 Barr., 493; Path *v.* Anstatt, 4 W. & S., 307; Stewart *v.* Freeman, 10 Harris, 123; Cockey *v.* Milne's Lessee, 16 Md., 207; Walsh *v.* Boyle, 30 Md., 267; Busey *v.* Reese, 38 Md., 264; Nelson *v.* Hagerstown Bank, 27 Md., 51; Homer *v.* Grosholz, 38 Md., 521; Glenn *v.* Davis, 35 Md., 215; Abrams *v.* Sheehan, 40 Md., 446; Kane *v.* Roberts, 40 Md., 590; Harral *v.* Gray, 10 Neb., 189; Hooker *v.* Hammil, 7 Neb., 234; Lincoln, etc., Ass'n *v.* Hass, 10 Neb., 583; Jones *v.* Johnson, etc., Co., 8 Neb., 451; Hays *v.* McGuire, 8 Yerg., 92; Thomas *v.* Blackmore, 5 Yerg., 113; Vance *v.* McNairy, 3 Yerg., 176; Shields *v.* Mitchell, 10 Yerg., 8.

ord, something further is in general required. The general tenor of the statutes is, that conveyances not properly recorded shall be held void as against a subsequent *bona fide* purchaser or incumbrancer, for a valuable consideration, whose deed is first filed for record. Hence, the advantage only lies with the subsequent purchaser by virtue of priority in placing his deed on record.[1] Some of the statutes, however, provide that unregistered deeds shall be void not only against subsequent purchasers without notice, but also as against creditors of the vendor or mortgagor.[2] And in others, where creditors are not specially mentioned, all instruments affecting the title are declared void, against all persons except the parties thereto and their heirs, or those having notice, until filed for record.[3] But in the state of

[1] Westbrook *v.* Gleason, 79 N. Y., 23; Page *v.* Waring, 76 N. Y., 463; Judson *v.* Dada, 79 N. Y., 373: Lacustrine, etc., Co. *v.* Lake Guano, etc., Co., 82 N. Y., 476; Schutt *v.* Large, 6 Barb., 373; Hoyt *v.* Thompson, 5 N. Y., 347; Truscott *v.* King, 6 Barb., 346; Newton *v.* McLean, 41 Barb., 285; Odd Fellows' S. B'k *v.* Banton, 46 Cal., 604; Snodgrass *v.* Bicketts, 13 Cal., 360; Landers *v.* Bolton, 26 Cal., 393; Packard *v.* Johnson, 51 Cal., 545; Frey *v.* Clifford, 44 Cal., 335; Patterson *v.* Donner, 48 Cal., 369; Wilcoxson *v.* Miller, 49 Cal., 193; Mahoney *v.* Middleton, 41 Cal., 41; Smith *v.* Yule, 31 Cal., 180; Fair *v.* Stevenot, 29 Cal., 486; Jones *v.* Marks, 47 Cal., 242; Thompson *v.* Pioche, 44 Cal., 508; O'Rourke *v.* O'Connor, 39 Cal., 442; Vassault *v.* Austin, 36 Cal., 691; Lawton *v.* Gordon, 37 Cal., 202; Fogarty *v.* Sawyer, 23 Cal., 570; Grellet *v.* Heilshorn, 4 Nev., 526; Warner *v.* Whittaker, 6 Mich., 133; Wilcox *v.* Hill, 11 Mich., 256; Doyle *v.* Stevens, 4 Mich., 87; Barrows *v.* Baughman, 9 Mich., 213; Rood *v.* Chapin, Walk. Ch., 79; Coy *v.* Coy, 15 Minn., 119; Godfroy *v.* Disbrow, Walk. Ch., 260; Smith *v.* Gibson, 15 Minn., 89; Edminster *v.* Higgins, 6 Neb., 269; Metz *v.* State B'k, etc., 7 Neb., 171; Colt *v.* Du Bois, 7 Neb., 394; Galway *v.* Malchow, 7 Neb., 289; Dorsey *v.* Hall, 7 Neb. 465; Berkley *v.* Lamb, 8 Neb., 399; Mansfield *v.* Gregory, 8 Neb., 435.

[2] Graves *v.* Ward, 2 Duv., 301. See, also, Byers *v.* Engle, 16 Ark., 543; Ducoway *v.* Galt, 20 Ark., 190; Hamilton *v.* Fowlkes, 16 Ark., 340; Koons *v.* Grooves, 20 Iowa, 373; Senter *v.* Turner, 10 Iowa, 517; Dargin *v.* Beeker, 10 Iowa, 571; May *v.* McKeenon, 6 Humph., 209.

[3] Reed *v.* Ownby, 44 Mo., 204; School Dist. *v.* Taylor, 19 Kans., 287; Wickersham *v.* Chicago, etc., Co., 18 Kans., 487; Claggett *v.* Crall, 12 Kans., 393; Johnson *v.* Clark, 18 Kans., 157; Stewart *v.* Clark, 13 Metc. (Mass.), 79; Flynt *v.* Arnold, 2 Metc. (Mass.), 619; Coffin *v.* Ray, 1 Metc.,

Alabama the deed is valid against creditors other than those by judgment.[1]

§ 97. Registration Notice to Subsequent Purchasers.— It may be stated, then, as a rule applicable to almost all the states, that where an instrument by which the title to real estate is affected is properly recorded, the record thereof is constructive notice to subsequent purchasers or incumbrancers under the same grantor. There are a few exceptions to this doctrine, and these for the most part apply to conveyances of equitable rights or interests.[2] But as a general rule any instrument affecting the title, which is properly recorded, is absolute notice to every one subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make an examination. The presumption of knowledge is conclusive that he has full notice of any interest, legal or equitable, which is conveyed, incumbered or in any manner affected by the recorded instrument.[3]

212; Pomroy *v.* Stevens, 11 Metc. (Mass.), 244; Houghton *v.* Bartholomew, 10 Metc. (Mass.), 138; Dole *v.* Thurlow, 12 Metc. (Mass.), 157; Marshall *v.* Fisk, 6 Mass., 24; Stetson *v.* Gulliver, 2 Cush., 494; Bayley *v.* Bailey, 5 Gray, 505; Lawrence *v.* Tucker, 7 Me., 195; Rackleff *v.* Norton, 19 Me., 274; Merrill *v.* Ireland, 40 Me., 569; Goodman *v.* Cloudman, 43 Me., 577. See, also, Nice's Appeal, 54 Pa. St., 200; Adams' Appeal, 1 Pa. St., 447.

[1] Smith *v.* Branch Bank, 21 Ala., 125; Daniels *v.* Sorrells, 9 Ala., 436; Andrews *v.* Burns, 11 Ala., 691; Ohio, etc., Co. *v.* Ledyard, 8 Ala., 866.

[2] Doswell *v.* Buchanan, 3 Leigh, 365; Walker *v.* Gilbert, 1 Freem. Ch., 75; Ludlow *v.* Van Ness, 8 Bosw., 178; De Ruyter *v.* Trustees, etc., 2 Barb. Ch., 556; Berson *v.* Neman, 63 Cal., 550.

[3] Cook *v.* Travis, 20 N. Y., 400; Rounds *v.* McChesney, 7 Cow., 360; Wood *v.* Chapin, 13 N. Y., 509; Taylor *v.* Thomas, 5 N. J. Eq., 331; Routh *v.* Spencer, 38 Ind., 393; Harang *v.* Plattsmier, 21 La. An., 426; Hunt *v.* Johnson, 19 N. Y., 279; Armijo *v.* New Mexico, etc., Co., 5 West Coast Rep., 482; Cushing *v.* Ayer, 25 Me., 383; Mason *v.* Martin, 4 Md., 124; Vaughan *v.* Greer, 38 Tex., 530; Mayo *v.* Cartwright, 30 Ark., 407; Randolph *v.* N. J. West L. R. R. Co., 28 N. J. Eq., 49; Woodworth *v.* Guzman, 1 Cal., 203; Call *v.* Hastings, 3 Cal., 179; Demis *v.* Burrett, 6 Cal., 670; Chamberlain *v.* Bell, 7 Cal., 292; Bird *v.* Dennis, 7 Cal., 297; Hunter *v.* Watson, 12 Cal., 363; McCabe *v.* Grey, 20 Cal., 509; Grant *v.* Bissett, 1 Caines' Cas., 112; Jackson *v.* Van Valkenburgh, 8 Cow., 260;

§ 98. To Affect Purchasers Must be Properly of Record.— But this rule, though applicable to all cases, is not applicable in the same manner, for the reason that the statutes are far from uniform in their provisions as to what is essential, in order to render an instrument properly recordable. If not recordable under the law, it could not be treated as properly recorded.[1] Many of them also differ widely from each other in regard to the time from which the record operates as notice.

§ 99. Prerequisites to Registration.— In a majority of the states, the instrument is entitled to registration when it is properly executed by the party to be bound by its terms, and acknowledged before an officer authorized to take acknowledgments. Subscribing witnesses are dispensed with except as a substitute for the acknowledgment before the officer. But in the states of Connecticut, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, New Hampshire, Ohio, South Carolina, Texas, Vermont and Wisconsin, the execution is required to be attested by either one or two subscribing witnesses.[2] In the state of Louisiana the attesting witnesses are required to be males, and, where the party is blind, three witnesses are required.[3]

§ 100. Subscribing Witnesses.— The provisions in regard to subscribing witnesses are variously modified in the different states. In some of them the rule is quite peremptory and governs all conveyances of real estate, while in others it depends upon where the instrument is executed — whether within or without the limits of the state, the char-

Jackson *v.* Given, 8 Johns., 137; Webster *v.* Van Steenburgh, 46 Barb., 211; Holbrook *v.* Dickenson, 56 Ill., 497; Hogden *v.* Guttery, 58 Ill., 431; Harrington *v.* Allen, 48 Miss., 493; Peychard *v.* Citizens' B'k, 21 La. An., 262; Gower *v.* Doheney, 33 Iowa, 36; English *v.* Waples, 13 Iowa, 570; Stewart *v.* Huff, 19 Iowa, 557; Haynes *v.* Seachrest, 13 Iowa, 455; Bostwick *v.* Powers, 12 Iowa, 456; Scales *v.* Wilsey, 11 Iowa, 261.

[1] See *infra*, § 119 *et seq.*

[2] See statutes of states mentioned.

[3] Civil Code La., art. 2231.

acter of the instrument, and other circumstances. In some of them, too, the consequences of a failure to conform to the law with strictness, in the matter of attestation, are more disastrous than in others, especially with reference to the effect upon their registration.[1]

§ 101. When Instrument to be Filed.— In general, the record operates as notice from the date of filing the instrument for record, or from the date of its registration, or other formality deemed sufficient to bring the knowledge of its execution and delivery within the reach of any one who has an interest in making inquiry. But in several of the states the statutes prescribe certain periods of time within which the instrument shall be deposited with the designated officer for record. These periods vary in the different states, as follows: *In Alabama*, three months; *Delaware*, one year; *District of Columbia*, six months; *Florida*, six months; *Georgia*, one year; *Indiana*, forty-five days; *Kentucky*, sixty days when executed and acknowledged within the state, and four months in cases of non-resident grantors; *Maryland*, six months; *New Jersey*, fifteen days; *Ohio*, six months; *Oregon*, five days; *Pennsylvania*, when within the state, six months; when the deed is executed without the state, one year; *South Carolina*, thirty days; *Virginia*, within sixty days after delivery of the instrument.[2]

§ 102. Consequence of Delay in Filing.— These provisions are not ordinarily construed as fixing periods of limitation, but rather as giving the grantee so much time,

[1] See cases cited *infra*, §§ 137, 225.

[2] See Reasoner *v.* Edmonson, 5 Ind., 393; Bird *v.* Wilkinson, 4 Leigh, 266; Beverly *v.* Ellis, 1 Rand., 102; McClure *v.* Thistle, 2 Gratt., 182; Glazebrook *v.* Ragland, 8 Gratt., 344; Beck *v.* De Baptists, 4 Leigh, 349; Lane *v.* Mason, 5 Leigh, 520; Williams *v.* Beard, 1 S. C., 309; Steel *v.* Mansell, 6 Rich., 437; Bank of State *v.* S. C. Man. Co., 3 Strobh., 190; Tact *v.* Crawford, 1 McCord, 265; Boyce *v.* Shiver, 3 S. C., 515; Massey *v.* Thompson, 2 Nott & McC., 105; McFall *v.* Sherrard, Harper, 295; Dawson *v.* Dawson, Rice, Eq., 243; Byles *v.* Tome, 39 Md., 461; Building Ass'n *v.* Wilson, 41 Md., 514; Hoopes *v.* Knell, 31 Md., 550.

as days of grace, within which their instruments may be registered, without incurring the danger of being cut out by conveyances from the same grantor during the intermediate time.[1]

§ **103. Exceptional Legislation.**— Exceptional acts of legislative bodies of the states may provide for the filing of such instruments in a manner to give purchasers the substantial benefits of registration without affecting them with constructive notice; as the law enacted by the legislation of the state of New York, January 8, 1794. The object of this act was to settle conflicting claims to bounty lands in that state. It provided that all deeds and conveyances theretofore executed of or concerning such lands, or whereby they might be affected at law or in equity, should, on or before a day named, be deposited with the clerk of the city of Albany, and all such, except mortgages duly registered, not so deposited should be adjudged fraudulent and void as against subsequent purchasers or mortgagees for a valuable consideration. It was made the duty of the clerk to keep these instruments arranged in alphabetical order, "to the end that persons inclining to have recourse thereto may inspect the same, paying the usual fees for search and inspection." A subsequent portion of the same act provided for the registry of deeds thereafter executed; but it was held that compliance with the first provision of the act would not charge subsequent purchasers with constructive notice of the instruments deposited with the clerk.[2]

§ **104. English and Irish Registry Acts.**— Under some of the English and Irish registry acts it has been decided that the registry of an instrument does not itself operate

[1] *Infra*, §§ 225, 268.

[2] Wendell *v.* Wadsworth, 20 Johns., 658; Grimstone *v.* Carter, 3 Paige, 421; Doswell *v.* Buchanan, 3 Leigh, 365; Goveneur *v.* Lynch, 2 Paige, 300; De Reuyter *v.* Trustees, etc., 2 Barb. Ch., 556; Ludlow *v.* Van Ness, 8 Bosw., 178; Swigert *v.* Bank, etc., 17 B. Mon., 268; Corn *v.* Sims, 3 Metc. (Ky.), 391; Walker *v.* Gilbert, 1 Freem. Ch., 75; Kelly *v.* Mills, 41 Miss., 267; Jaques *v.* Weeks, 7 Watts, 261.

as constructive notice to subsequent purchasers.[1] But although the Irish acts do not in express terms declare that the record of conveyances shall be notice to subsequent purchasers, this effect is given to a compliance with the statute, for the reason that the first one of two purchasers of the same property, who records his conveyance, will have the prior right, although they each purchase from the same grantor. And the statute is held to apply to all instruments affecting the title to real estate.[2]

§ **105. Equitable Mortgage.**—Where a mortgage had been duly registered, and S. subsequently received the title deeds on deposit as security for a debt owing by the mortgagor without *actual notice* of the prior registered mortgage, it was held that the possession of such title deeds was available in his hands as an equitable mortgage upon the premises, notwithstanding the formal registry of the prior mortgage.[3]

§ **106. Registry of Marriage Settlement.**—So, also, where the law provided for the registry of marriage settlements, it was held, in the case of Hodgson *v.* Dean,[4] that a subsequent purchaser of the land included in such settlement could only be affected by actual notice. It was decided that the defendant was not bound to search the register, and therefore could not be constructively notified of its contents.

§ **107. Irish Act.**—The Irish registry act, under which the case of Bushell *v.* Bushell[5] was decided, after providing

[1] Hodgson *v.* Dean, 2 Sim. & Stu., 227; Underwood *v.* Lord Courtown, 2 Schoales & Lefroy, 40; Bushell *v.* Bushell, 1 id., 90, 103; Morecock *v.* Dickens, Ambl., 678; Ford *v.* White, 16 Beav., 120.

[2] Latouch *v.* Lord Dunsany, 1 Sch. & Lef., 159; Drew *v.* Lord Norbury, 3 Jones & L., 267; Thompson *v.* Simpson, 1 Dru. & War., 459; *In re* Driscoll, 1 I. R. Eq., 285; Mill *v.* Hill, 12 Jones & L., 107; 3 H. L. Cas., 828; Corbett *v.* Cantillon, 5 Ir. Ch. R., 126; Hunter *v.* Kennedy, 1 Ir. Ch. R., 148.

[3] Wiseman *v.* Westland, 1 Young & Jervis, 117.

[4] *Supra*, § 104.

[5] 1 Sch. & Lef., 90.

for the registry of deeds and conveyances, declared "that every such deed or conveyance, a memorial whereof shall be duly registered according to the rules and directions in this act prescribed, shall be deemed and taken as good and effectual, both in law and equity, according to the priority of time of registering such memorial, for and concerning the honors, manors, etc., in such deed or conveyance mentioned or contained, according to the right, title and interest of the person so conveying, etc., against all and every other deed, conveyance or disposition of the honors, etc., or any part thereof, comprised or contained in any such memorial as aforesaid." Still this was not deemed sufficient to constitute such registry constructive notice to a subsequent purchaser of the property included in the memorial, and he would not be bound except by actual notice.

§ 108. Registered Mortgage and Unregistered Will.— A more recent case arising under the registry act for the East Riding of Yorkshire [1] seems to present a view of the law somewhat more favorable to the tenant whose evidence of title is registered, than is accorded to him in the earlier English cases cited. It is decided that a mortgagee whose mortgage has been duly registered shall prevail against a devisee in an unregistered will which was discovered subsequent to the registration of the mortgage given by the heir, and after the time within which the registry act required wills to be registered in order to be valid against conveyances from the heir. The statute also provides that where there is an impediment to the registration of the will within the time, that the registration of a memorial of such impediment will preserve the rights of devisees, as though the will itself had been registered, until such time as the impediment is removed. It was held in the case cited that the failure to discover the will was such an impediment as was contemplated by the act, and because the

[1] Chadwick *v.* Turner, 1 Ch. Ap. Cas., 310.

devisees who were ignorant of their interests in the premises did not deposit for registration a memorial of the impediment to the registration of the subsequently discovered will, that instrument was void as against the subsequent mortgagee without notice.[1]

§ 109. **Registered Legal Mortgage and Unregistered Equitable Mortgage.**— So under the registry act for Ireland in a recent case,[2] where the owner of an estate had created an unregistered equitable mortgage upon his estate by the deposit of the title deeds, such equitable mortgage was postponed to a subsequent registered legal mortgage. And it was further held that such legal mortgage could not be successfully assailed upon the ground that the solicitor employed to draw the same accepted a frivolous excuse for the absence of the title deeds, and drew the mortgage from memoranda of the contents of the deeds furnished by the mortgagor. It was held to be inconsistent with the policy of the Irish registry law to impose on a mortgagee or purchaser the duty of inquiry, with a view to the discovery of previous unregistered interests.

§ 110. **Memorandum of Further Charge.**— So, also, where a mortgage was given on lands in Yorkshire and was duly registered under the act,[3] and a subsequent memorandum of "further charge" on the same property in favor of the mortgagee for additional advances was made, although no amount was mentioned in the mortgage, the memorandum was deemed a proper instrument for registry, and not being registered was postponed to a subsequent registered mortgage in favor of a mortgagee without notice of the further charge.[4]

§ 111. **Agreement to Mortgage.**— An unregistered agreement to give a mortgage on lands in a register county was

[1] See Wyatt *v.* Barwell, 19 Ves., 435.

[2] Agra. Bank *v.* Barry, L. R., 7 H. L., 135.

[3] 2 and 3 Anne, ch. 4.

[4] Credland *v.* Potter, 18 Eq. Cas., 350; S. C., affirmed, 10 Ch. Ap. Cas., 8.

held, pursuant to the registry act,[1] to be a proper subject for registration, and was accordingly postponed to a subsequent registered mortgage, taken without notice of the unregistered agreement.[2]

§ **112. Acknowledgment.**— The recording acts of the states of this Union almost uniformly require instruments offered for record to be duly acknowledged before an officer authorized by law to take acknowledgments. And though the officers designated by law to receive such instruments for record have no judicial authority to determine whether they are legally entitled to registry, and consequently receive and file such as are offered, regardless of legal defects in their execution or acknowledgment, yet a failure to comply with these formal prerequisites on the part of a grantee generally has the effect to invalidate the record as constructive notice to subsequent purchasers.[3] It is not sufficient that the genuineness of the signature, or even the *fact* that the execution was properly acknowledged, can be established by evidence. All this must appear in the official certificate attached to the instrument, and be spread upon the records, in order that the record shall operate as constructive notice.

[1] 5 Anne, ch. 18.

[2] *In re* Wright's Mortgage Trust, 16 Eq. Cas., 41.

[3] Herndon *v.* Kimball, 7 Ga., 432; Graves *v.* Graves, 6 Gray, 391; Selking *v.* Hebel, 1 Mo. App., 340; Brown *v.* Lunt, 37 Me., 423; De Witt *v.* Moulton, 17 Me., 418; Stevens *v.* Morse, 47 N. H., 532; Isham *v.* Bennington Iron Co., 19 Vt., 230; Blood *v.* Blood, 23 Pick., 80; Sumner *v.* Rhodes, 14 Conn., 135; Carter *v.* Champion, 8 Conn., 548; Green *v.* Drinker, 7 W. & S., 440; Heistner *v.* Fortner, 2 Binn., 40; Parkist *v.* Alexander, 1 Johns. Ch., 394; Johns *v.* Reardon, 3 Md. Ch., 57; Cockey *v.* Milne, 16 Md., 200; Thomas *v.* Grand Gulf B'k, 9 Sm. & M., 201; Work *v.* Harper, 24 Miss., 517; Strong *v.* Smith, 3 McLean, 362; Graham *v.* Samuel, 1 Dana, 166; White *v.* Denman, 1 Ohio St., 110; Reynolds *v.* Kingsbury, 15 Iowa, 238; Brinton *v.* Seevers, 12 Iowa, 389.

II. Recordable Instruments.

§ 113. What Instruments Should be Recorded.
114. Reservation of Right of Way.
115. Deed of Assignment.
116. Assignment of Lease.
117. Assignment of Mortgages.
118. Consideration.
119. Instruments Not Recordable.
120. Assignment for Benefit of Creditors.
121. Certificate of Emancipation.
122. Executory Contract.
123. Same.

§ 113. What Instruments Should be Recorded.— In construing some of the registry acts of the states of the Union, it has been held that only instruments by which the legal title to the premises was conveyed were entitled to registration.[1] But the prevailing rule now is that any instrument by which an equitable interest in the property is affected, or a right arising out of the property is granted or reserved, should be recorded,[2] and, if executed with all the formalities prescribed by law, the record will be constructive notice to subsequent purchasers or incumbrancers to the same extent as the record of a conveyance of the legal title.[3]

[1] Halstead *v.* Bank of Kentucky, 4 J. J. Marsh., 554.

[2] Notices of various kinds are required to be filed for record in order to establish liens upon real estate. It is held that a substantial compliance with the statute will create a mechanic's lien. Hobbs *v.* Spiegleberg, 5 West Coast Rep., 327.

[3] Parkist *v.* Alexander, 1 Johns. Ch., 394; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch., 381; Alderson *v.* Ames, 6 Md., 52; Russel's Appeal, 15 Penn. St., 319; Bellas *v.* McCarty, 10 Watts, 13; Digman *v.* McCollum, 47 Mo., 372; Ray *v.* Bush, 1 Root, 81; St. Andrews *v.* Lockwood, 2 Root, 239; Welsh *v.* Gould, 2 Root, 287; Hall's Heirs *v.* Hall, 2 Root, 383; Alexander *v.* Webster, 6 Md., 359; Gen. Ins. Co. *v.* U. S. Ins. Co., 10 Md., 517; Beers *v.* Hawley, 2 Conn., 467; Wheaton *v.* Dyer, 15 Conn., 307; Hinman *v.* Hinman, 4 Conn., 575; Hine *v.* Robbins, 8 Conn., 342; Dickenson *v.* Glenny, 27 Conn., 104; Hunt *v.* Johnson, 19 N. Y., 279; Crane *v.* Turner, 7 Hun, 357; 67 N. Y., 437; Patten *v.* Moore, 32 N. H., 382; Griswold *v.* Smith, 10 Vt., 452; Siter *v.* McClanachan, 2 Gratt., 280; Doyle *v.* Teas,

§ 114. Reservation of Right of Way.— So where a right of way was, by agreement, reserved out of land conveyed by a deed in which no mention of the reservation was made, it was held that an innocent purchaser, for a valuable consideration, from the grantee was not charged with notice of such reservation, because the same had not been reduced to writing and filed for record as was required of instruments affecting the title to the land itself.[1] The same rule would hold good of other easements, either granted or reserved.

§ 115. Deed of Assignment.— It has also been held that a deed of assignment in trust for the benefit of creditors may be recorded. And, in the absence of fraud, such record would be sufficient notice to the creditors affected by the conveyance.[2]

§ 116. Assignment of Lease.— So where a lease of real estate is transferred by a separate instrument, such instrument, being a transfer of an interest in land, is properly recordable; and when the statute is complied with in respect to the acknowledgment and other prerequisites, and the description is sufficiently certain to identify the premises as those contained in the lease, the record will operate as notice to subsequent purchasers.[3]

§ 117. Assignment of Mortgage.— And where the statute declared that assignments of mortgages "*may* be recorded," without special provision for the record of such assignments operating as notice, although the language was mandatory as to such records being received in evidence, it was decided that such records would be notice to subsequent purchasers or assignees, the same as though the provisions of the statute had been imperative in requiring the registry of assignments.[4]

5 Ill., 202; Wilder *v.* Brooks, 10 Minn., 50; Kiser *v.* Heuston, 38 Ill., 252; Bank of Greensboro *v.* Clapp, 76 N. C., 482; Schutt *v.* Large, 6 Barb., 373.

[1] Bush *v.* Golden, 17 Conn., 594.

[2] Farquharson *v.* Eichelberger, 15 Md., 63.

[3] Martindale *v.* Price, 14 Ind., 115.

[4] Pepper's Appeal, 77 Pa. St., 373; Phillips *v.* Bank of Lewistown, 18 Pa. St., 394.

§ 118. **Consideration.**— The fact that such a deed is without consideration, or has only such consideration as at common law is called *good* as distinguished from *valuable*, does not disentitle it to registry; and being recorded after all the requisite formalities have been complied with, the record operates as notice, as though the conveyance were for a valuable consideration.[1] Of deeds of this class, those from husband to wife are instances, and the record of such deeds has been held to stand upon the same footing as to notice as the record of any other conveyance.[2]

§ 119. **Instruments Not Recordable.**— But an instrument which is not required to be recorded, nor even mentioned in the statutes among those which may be recorded, would not be regarded as one contemplated by the legislature as a recordable instrument; consequently, should it be copied upon the records, such copy would not amount to constructive notice to any one.[3]

§ 120. **Assignment for Benefit of Creditors.**— So where a deed of assignment for the benefit of creditors was not required by law to be recorded, the record of such deed was held not to be notice to those who might purchase in ignorance thereof.[4]

§ 121. **Certificate of Emancipation.**— So, also, was it held that a certificate of emancipation was an instrument

[1] Mayor *v.* Williams, 6 Md., 235; Williams *v.* Banks, 11 id., 198; Cook's Lessee *v.* Kell, 13 Md., 469.

[2] Wilder *v.* Brooks, 10 Minn., 50; Digman *v.* McCollum, 47 Mo., 372. But a subsequent conveyance, to take advantage of a prior unregistered instrument, must be supported by a consideration. Merriman *v.* Hyde, 9 Neb., 120; *infra*, § 226.

[3] James *v.* Morey, 2 Cow., 246; Villard *v.* Robert, 1 Strobh. Eq., 393; Moreau *v.* Detchemendy, 18 Mo., 522; Parker *v.* Hill, 8 Metc., 447; Jones *v.* Roberts, 65 Me., 273; Parret *v.* Shaubhut, 5 Minn., 323; Washburn *v.* Burnham, 63 N. Y., 301; Grimstone *v.* Carter, 3 Paige, 421; Betser *v.* Rankin, 77 Ill., 289; Pitcher *v.* Barrows, 17 Pick., 361; Boggs *v.* Varner, 6 Watts & S., 469; Mott *v.* Clark, 9 Pa. St., 399; Graves *v.* Graves, 6 Gray, 391; Bossard *v.* White, 9 Rich. Eq., 483; Galpin *v.* Abbott, 6 Mich., 17; Reed *v.* Coale, 4 Ind., 283; Brown *v.* Budd, 2 Ind., 442; Lewis *v.* Baird, 3 McLean, 56.

[4] Burnham *v.* Chandler, 15 Tex., 441.

not required to be recorded nor entitled to record.[1] And the same was held regarding a deed to a slave, though it was decided that the recording of such deed was sufficient to rebut the idea of concealment, and might be offered in evidence as a circumstance tending to prove actual notice.[2]

§ **122. Executory Contract.**— An executory contract, except where its registry is provided for by law, would gain nothing by being recorded. Such record would not be notice of the existence of such contract to any persons except those who actually saw the same.[3]

§ **123. Same.**— And even where the New York statute made provision for the registry of such contracts,[4] it was held that the record did not constructively impart notice to any one, because the statute providing for their registry was merely to preserve the evidence of the contract, and not to give notice of its existence.[5]

[1] Commonwealth *v.* Rhodes, 6 B. Mon., 171.

[2] Bossard *v.* White, 9 Richardson's Eq., 483.

[3] Mesick *v.* Sunderland, 6 Cal., 297.

[4] 1 R. S., 762, § 29.

[5] Washburn *v.* Burnham, 63 N. Y., 132; Boyd *v.* Schlesinger, 59 id., 301. The original and not a copy must be filed for record. Ladley *v.* Creighton, 70 Pa. St., 490.

III. Statutory Prerequisites to Recording.

§ 124. Statute Must be Complied With.
125. Necessity of Acknowledgment.
126. Certificate of Official Character Required.
127. Defective Acknowledgments Cured by Legislation.
128. Acknowledgment Unnecessary.
129. Execution Acknowledged by One of Two Grantors.
130. Officers Before Whom Acknowledgment Made.
131. Lack of Uniformity in Designating Officers.
132. Acknowledgment of Deed Affecting Land in Another State.
133. Justices of the Peace.
134. Acknowledging Officer a Party in Interest.
135. Defects Must Appear Upon the Face.
136. Officers *De Facto*.
137. Attesting Witnesses.
138. When Two Required.
139. Witnessed by One. Insufficient.
140. Defective Execution Held Immaterial.
141. Record Inoperative Without Delivery.
142. Delivery After Recording.
143. Same — Effect of Subsequent Delivery.
144. Must be Recorded by Proper Officer.
145. Recorded by Officer *De Facto*.
146. Same.

§ 124. Statute Must be Complied With.— The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the record of the instrument will be inoperative as constructive notice.[1]

§ 125. Necessity of Acknowledgment.— In many instances this construction of the statute has seemed to work hardship upon those who had purchased upon the faith of the record title. But not only is the construction given to the statute by the courts strictly defensible, but the statutory provision itself is dictated by the highest considera-

[1] Shults *v.* Moore, 1 McLean, 520; Zeigler *v.* Shomo, 78 Penn. St., 357; Pringle *v.* Dunn, 37 Wis., 449; Galpin *v.* Abbott, 6 Mich., 17; Graves *v.* Graves, 6 Gray, 391.

tions of security to owners of real estate. Were it not for this check upon human cupidity the records might be cumbered with fraudulent conveyances from supposititious grantors, which, while they failed to clothe the grantees with even a shadow of title, would suffice so to becloud the titles of those who were purchasers from the true owners, as to frighten timid purchasers and depreciate the value of property. So, too, is this wise provision a wholesome restraint upon forgery. The commission of this crime is rendered less easy and safe when, to make it effective, it becomes necessary for the forger to take a public officer into his confidence.[1] In some of the states, however, where deeds are required to be acknowledged in order that they, or certified copies thereof, may be offered in evidence without further proof of their execution, the omission of this formality does not affect the record of the instrument as constructive notice.[2]

§ 126. Certificate of Official Character Required.— Following this principle of construction of a statute requiring the certificate of a clerk of a court of record, where the acknowledgment was before a notary public in another state, to the genuineness of the notary's seal and certificate, it was held that a deed acknowledged beyond the limits of the state before a notary whose official character, etc., was not so certified, was improperly admitted to record, and did not operate as constructive notice.[3]

§ 127. Defective Acknowledgments Cured by Legislation.— In some of the states, however, legislation has come to the relief of defectively acknowledged instruments. The general tenor of these curative acts is that from the taking

[1] De Witt *v.* Moulton, 17 Me., 418; Isham *v.* Bennington Iron Co., 19 Vt., 230; Stevens *v.* Morse, 47 N. H., 532; Johns *v.* Reardon, 3 Md. Ch., 57; Heistner *v.* Fortner, 2 Binn., 40; Blood *v.* Blood, 23 Pick., 80; Strong *v.* Smith, 3 McLean, 362; Sumner *v.* Rhodes, 14 Conn., 135; Work *v.* Harper, 24 Miss., 517; Reynolds *v.* Kingsbury, 15 Ia., 238; Graham *v.* Samuel, 1 Dana, 166; Hodgson *v.* Butts, 3 Cranch, 140; Harper *v.* Reno, 1 Freem. Ch., 323; Thomas *v.* Grand Gulf B'k, 9 Sm. & M., 201.

[2] *Infra*, § 128.

[3] Musgrove *v.* Bonser, 5 Oregon, 313.

effect of the statute all instruments previously recorded, defectively acknowledged or attested, or not acknowledged and attested at all, should operate as constructive notice to purchasers to the same extent as though they had been properly acknowledged. Notwithstanding the apparent retrospective operation of statutes of this kind, they have uniformly been approved by the courts and sustained as constitutional.[1]

§ 128. Acknowledgment Unnecessary.— Under statutes which may fairly be regarded as exceptional, the record of a deed has been held to operate as constructive notice to subsequent purchasers though defectively acknowledged.[2] And where the statute provided that no instrument affecting real estate should be of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded, and that where a deed had been acknowledged and certified in the manner prescribed by law, the original might be read in evidence without further proof of the execution,[3] it was held that as the statute was silent as to the matter of acknowledgment as a prerequisite to the registry of the deed, and only required this formality as a condition to its being read in evidence without proof of execution, a deed in fact registered, even though it were not acknowledged, would be constructive notice to subsequent grantees who purchased for value, and without actual notice.[4]

§ 129. Execution Acknowledged by One of Two Grantors.— And even in a case where the statute required the instrument to be acknowledged to render its registry effective as notice to subsequent purchasers, it was held that an

[1] Watson *v.* Mercer, 8 Peters, 88; Tate *v.* Stooltzfoods, 16 Serg. & Rawle, 35; Wallace *v.* Moody, 26 Cal., 387; Logan *v.* Williams, 76 Ill., 175; Gatewood *v.* Hart, 58 Mo., 261; Allen *v.* Moss, 27 Mo., 354; Barnet *v.* Barnet, 15 Serg. & R., 72; Hughes *v.* Cannon, 2 Humph., 589; Reed *v.* Kemp, 16 Ill., 445; Brown *v.* Simpson, 4 Kans., 76.

[2] Gillespie *v.* Reed, 3 McLean, 377; Reed *v.* Kemp, 16 Ill., 445. (Under Stat. July 21, 1827.)

[3] Comp. Laws Kansas, p. 355.

[4] Simpson *v.* Mundee, 3 Kan., 172; Brown *v.* Simpson, 4 Kan., 76.

acknowledgment by one of two grantors met all the requirements of the statute, so as to render the record of the deed not only constructive notice of the conveyance of the interest of the grantor who acknowledged the deed, but also the interest of the one who failed to acknowledge.[1] The reasoning in this case was that the object of the statute being to give publicity to conveyances, that object was attained whenever the deed was placed upon record, and it could not have been recorded without authority, because, when it was acknowledged by one, its registry was authorized as to him, and it was quite clear that his conveyance could not be recorded without recording that of the other grantor.

§ 130. Officers Before Whom Acknowledgment Made.— The officers empowered to certify to the acknowledgment of instruments for record as designated by the recording acts of the various states are numerous and diverse in their characters. But perhaps the most universally recognized, as well as the most generally resorted to, are notaries public. In addition to these are judges, including justices of the supreme court of the United States, and of the different states and territories, county and probate judges, and nearly all judicial officers of intermediate degree. Another class that is quite generally recognized are justices of the peace. These, as well as most other officers who do not use a seal to authenticate their official acts, are less frequently employed, for the reason that it is generally necessary, when the instrument affects property in another state, to fortify their certification of the acknowledgment by the certificate of the clerk of a court of record that such officer had been commissioned and qualified, and that his signature is genuine. Besides those already mentioned are chancellors, clerks, mayors, masters in chancery, court commissioners, prothonotaries, foreign ministers, consuls, and other diplomatic officers, and commissioners especially appointed for that purpose by governors of different states. Even surveyors, and army officers of the rank of major, or of higher rank, have been designated in some instances.

[1] Shaw *v.* Poor, 6 Pick., 86.

§ 131. Lack of Uniformity in Designating Officers.— It may not be out of place to remark here that much of the apparent harshness in the operation of the recording acts arises from mistake in selecting the officers before whom acknowledgments are made. These misfortunes are owing to a want of uniformity in the statutes of the different states. And it is no consolation, but rather an aggravation, to reflect that the diversities have no better foundation than local caprice.

§ 132. Acknowledgment of Deed Affecting Land in Another State.— When the instrument executed in one state affects the title to land in another, the law of the state where the land lies, of course, will govern, and not that of the place where the instrument is executed and acknowledged. As the validity of the record depends in no small degree upon the officer whose certificate authenticates the acknowledgment, the selection of the proper one becomes a matter of importance.

§ 133. Justices of the Peace.— It has been held under a statute limiting the jurisdiction of justices of the peace to taking the acknowledgments of such instruments as affected lands lying within their own counties, that where the acknowledgment was taken before a justice, to a deed of land in another county, the record of such deed failed to impart constructive notice.[1]

§ 134. Acknowledging Officer a Party in Interest.— So, also, when there is any circumstance that disqualifies the officer from acting in the particular instance, the record will be vitiated. As, when on the face of the deed it appeared that the acknowledgment was before a party in interest, it was held to be improperly recorded, and that the record did not impart constructive notice to subsequent purchasers.[2]

§ 135. Defects Must Appear Upon the Face.— It would be otherwise, however, where the instrument was fair upon

[1] Bishop *v.* Schneider, 46 Mo., 472; Musick *v.* Barney, 49 Mo., 458; Gatewood *v.* Hart, 58 Mo., 261.

[2] Stevens *v.* Hampton, 46 Mo., 404.

its face, as the record will impart notice, notwithstanding hidden defects in the execution or acknowledgment.[1]

§ 136. **Officer De Facto.**— But where the acknowledgment is certified by an officer *de facto*, though he be a usurper of the office, if the jurisdiction extends to the taking of acknowledgments, the instrument will be properly recorded, and the record will be as effective as though it had been acknowledged before an officer *de jure*.[2] Any subsequent proceeding by which the usurpation of the office might be established would not affect the validity of his official acts regularly performed.

§ 137. **Attesting Witnesses.**— In a majority of the states of the Union the certificate of acknowledgment is all the authentication required to admit the instrument to record. It is only in the absence of such certificate that the execution is required to be proved by attesting witnesses, as a substitute for the more convenient method of acknowledgment before an officer. But in some of the states, as we have seen,[3] the attestation of witnesses is required in addition to the formal acknowledgments, and in some of these, instruments copied upon the records without being so attested have been held not to impart constructive notice by virtue of their registry.[4]

§ 138. **When Two Required.**— As where the execution of a deed was required by statute to be attested by two subscribing witnesses, and one of the names subscribed thereto was that of the wife of the party executing it as grantor, this defect was held to be of so substantial a nature that an instrument so witnessed was not a deed, and not entitled to be recorded; consequently the record would not operate as constructive notice.[5]

[1] Stevens *v.* Hampton, 46 Mo., 404.

[2] Brown *v.* Lunt, 37 Me., 423.

[3] *Supra*, § 99.

[4] Pringle *v.* Dunn, 37 Wis., 449; Parret *v.* Shaubhut, 5 Minn., 323; Galpin *v.* Abbott, 6 Mich., 17.

[5] Carter *v.* Champion, 8 Conn., 549.

§ 139. Witnessed by One, Insufficient.— So when a mortgage required by statute to be attested by two witnesses, in addition to the acknowledgment, though regular in every other respect, was executed in the presence of, and attested by, but one witness, this was held to be a substantial defect in the execution of the instrument, by reason of which it was not recordable, and the unauthorized record thereof would not affect subsequent purchasers or incumbrancers.[1]

§ 140. Defective Execution Held Immaterial.— But the authorities are not uniform in exacting strict compliance with legal requirements in the execution of the instrument as a condition precedent to its admission to the records. Where equitable interests are recognized as the proper subjects of registration, the record of any instrument which passes the equity would be good constructive notice of that interest, and would be as conclusive upon subsequent purchasers as though the legal title had passed to the grantee. In pursuance of this doctrine, where a seal was recognized as one of the essentials of a deed to real estate, and acknowledgment was the only legal formality prescribed for the admission to the public records of instruments whereby legal or equitable titles or interests in real estate were affected, it was held that a deed of conveyance from which the seal was omitted passed an equitable interest to the grantee, and, being duly acknowledged, was properly recorded, and the same effect was to be given to the record of this unsealed deed as it would have been entitled to had it been sealed. It was constructive notice to all subsequent purchasers.[2]

§ 141. Record Inoperative Without Delivery.— A further prerequisite to a valid registry is that the instrument must be delivered before recorded. Therefore the deed should not be deposited for record until after delivery. The obvious reason of this rule is that until delivery the deed is

[1] White *v.* Denman, 1 Ohio St., 110.

[2] McClurg *v.* Phillips, 57 Mo., 214; Harrington *v.* Fortner, 58 Mo., 468; Brydon *v.* Campbell, 40 Md., 331.

incomplete. It was not intended that instruments affecting the title to real estate, which were by law required to be recorded, should operate as constructive notice of a change of ownership in the property which they were utterly powerless to effect. A deed without delivery is as inoperative as though it had never been executed, and may be of even less effect than it would be with a defective execution.[1]

§ 142. **Delivery After Recording.**— Where a deed was executed and acknowledged by the grantor, who of his own motion filed it for record, and, after it had been duly copied upon the records, delivered it to the grantee, the record was held not to impart notice from the date of filing, for the reason that until delivered it was not a completed instrument, as the title to the property was still in the grantor.[2]

§ 143. **Same — Effect of Subsequent Delivery.**—Where, however, the deed is delivered *after* it has been recorded, it does not lose all the benefits of the registration, but the record will be notice to all who purchase subsequent to the delivery; but those who may have purchased during the time between the registration and the delivery of the deed, without notice, and for value, will be as effectually protected as though the instrument had never been recorded at all.[3]

§ 143a. **Delivery to the Recorder for the Grantee.**— It is not, however, to be understood, that to give the deed effect it must be delivered to the grantee in person. The title will pass as well when the deed is delivered to an intermediate party for the grantee, as when it is placed in the hands of the latter. And if this delivery is made to the recording officer, not only that he may spread its contents on the public records, but that he may act for the grantee in accepting the instrument; if the delivery be intended by the grantors as irrevocable between himself and the grantee, there is no reason why it should not operate as effectually to vest title in the purchaser as though it had

[1] Parker *v.* Hill, 8 Metc., 447.
[2] Parker *v.* Hill, 8 Metc., 447; Life Ins. Co. *v.* Rowand, 26 N. J. Eq., 389.
[3] Parker *v.* Hill, 8 Metc., 447; Jones *v.* Roberts, 65 Me., 273.

been personally delivered. And if it has this effect the record will take effect from the date of the deposit of the instrument with the officer.[1] The fact that the instrument was filed for record has been accepted as *prima facie* evidence of delivery;[2] but so far from its being regarded as conclusive, it was held to be rebutted by evidence that the execution and recording of the instrument was unknown to the grantee at the time, although he had previously assented to the conveyance.[3]

§ 144. **Must be Recorded by Proper Officer.**— It would seem scarcely necessary to add that, in order to render the recording effectual, it should be the act of an officer duly authorized and empowered to act in the premises. The mere copying an instrument upon the records by a volunteer who had not been previously deputized or authorized to perform the work would not amount to constructive notice.

§ 145. **Recorded by Officer De Facto.**— But where an officer is acting under a government *de facto*, though it be unlawful and revolutionary, if it be of paramount force within the district where the officer exercises his functions, his official acts, not directly in aid of the war power of the unlawful government, will be regarded as valid and binding.

§ 146. **Same.**— So the registry of a deed by a clerk who continued to exercise his official duties in the state of Virginia after the passage of the ordinance of secession, while the county was under control of the military power, was held valid.[4]

[1] See Gould *v.* Day, 94 U. S., 405; Cornall *v.* Duvall, 22 Ark., 136; Mallory *v.* Stoddar, 6 Ala., 801; Tibbals *v.* Jacobs, 31 Conn., 428; Renfro *v.* Harrison, 10 Mo., 411; Church *v.* Gilmore, 1 Wood, 656; Lady Superior *v.* McNamara, 3 Barb. Ch., 375; Marsh *v.* Austin, 1 Allen, 235; Bennett *v.* Waller, 23 Ill., 97; Hays *v.* Davis, 18 N. H., 600; Mysoner *v.* French, 73 N. C., 609; Withers *v.* Jenkins, 6 Rich. S. C., 122.

[2] Himes *v.* Keighblingher, 14 Ill., 469.

[3] Union, etc., Ins. Co. *v.* Campbell, 95 Ill., 267.

[4] Henning *v.* Fisher, 6 W. Va., 238. See, also, Texas *v.* White, 7 Wall. 733; Thorington *v.* Smith, 8 id., 1; Griffin *v.* Cunningham, 20 Gratt., 31; Sherfy *v.* Argenbright, 1 Heiskell, 128; Harrison *v.* Farmers' Bank of Virginia, 6 W. Va., 1.

IV. Errors in the Record.

§ 147. Effect of Error in Record.
148. Errors in Description.
149. Effect of Filing and Subsequent Error in Recording.
150. To Whom is the Officer Responsible for Errors?
151. Different Construction of the Statute.
152. The Notice Unaffected by Errors in Recording.
153. Partial Omission.
154. Entire Omission.
155. Views of Early American Authorities, 1793.
156. Same — 1794.
157. Destruction of the Records Does Not Affect Notice.
158. Effect of Error in Amount Secured by Mortgage.
159. Error in Description.
160. Fraudulent Concealment by Officer.
161. Immaterial Errors.
162. Principles Governing Errors in the Record.
163. Failure to Record in Proper Time.
164. The Index.
165. Failure to Index Does Not Affect Record.
166. Error in Index Does Not Affect Record.
167. Failure to Index Under Iowa Statute.
168. Index Sufficient to Put Upon Inquiry.
169. Index Held Part of the Record.
170. Grantee Cannot Control the Officer.
171. Mortgagee Not Affected by Officer's Failure.
172. Index No Part of the Record.
173. Same — Current of Authority.

§ 147. Effect of Error in Record.— The record, in order to fulfil its proper function, should be an exact copy of the words and figures contained in the original, set forth in their proper order of arrangement. The greatest care is usually taken, in recording, to produce a literal transcript of the instrument filed for record — even to the perpetuation of its errors and omissions. But in prosecuting his labors with the exact nicety required to avoid trifling errors, the officer occasionally commits errors of a graver sort, by which the record is liable to mislead. Errors of this kind have been held to vitiate the record and destroy its effi-

ciency as constructive notice.[1] Not only should the record be a faithful transcript of the original, but it is held that it must be recorded in the proper book in order to operate as constructive notice.[2] Where separate books are provided for absolute conveyances, and are differently designated from those used for mortgages, it has been decided that where a conveyance is recorded in the book of mortgages, or a mortgage in the book of conveyances, it will not become constructive notice for any purpose whatever.[3]

§ 148. Errors in Description.— As where the statute rendered the filing of the instrument constructive notice to all purchasers subsequent to the date of such filing, regardless of the time of copying the instrument upon the records, it was held that, after the record was completed, purchasers without actual notice of the contents of the original had only constructive notice of what such record would disclose; and there being an error in the description, by which it appeared that the interest conveyed was the *undivided* interest, whereas, in the original deed, it was the *individual* interest, it was held that the notice was only of the conveyance of the undivided half, as appeared by the records.[4] So where the recorder inserted the name of the wrong person as grantor, the record was treated as notice of a conveyance by the individual whose name was erroneously entered upon the records as executing the instrument.[5]

§ 149. Effect of Filing and Subsequent Error in Recording.— Many of the recent authorities seem to favor the view that when the instruments have been spread upon the records, they only give notice of the contents of such

[1] Jennings *v.* Wood, 20 Ohio, 261; Terrel *v.* Andrew County, 44 Mo., 309.

[2] Van Thorniley *v.* Peters, 26 Ohio St., 471.

[3] Leach's Appeal, 44 Pa. St., 140; Fisher *v.* Tunnard, 25 La. An., 179; Succession of Cordeviolle *v.* Dawson, 26 La. An., 534; Verges *v.* Prejean, 24 La. An., 78.

[4] Miller *v.* Bradford, 12 Ia., 14.

[5] Jennings *v.* Wood, 20 Ohio, 261.

as are correctly recorded, although previous to their being recorded the filing for record is complete notice of the contents of the original. The purchaser is protected in placing complete reliance upon the records as he finds them, and is not bound to take notice of errors in recording of which he has never been actually informed. This doctrine is fully maintained and ably set forth in the case of Terrel *v.* Andrew County,[1] by Judge WAGNER, who, in delivering the opinion of the court, says: "The obligation of giving the notice rests upon the party holding the title." If his duty is imperfectly performed, the consequences must fall upon him and not an innocent purchaser. In this case the filing is recognized as sufficient to protect the grantee, even where the deed has not been recorded. In examining titles, one first searches the records, and then examines the files in case he finds nothing recorded. But if the record shows a conveyance he will be guided by that, and will not consult the files in order to examine the original. It was held that the bond given by the recorder for the faithful performance of his duties was for the benefit of every person injured by his dereliction of duty, and not merely for the benefit of subsequent purchasers; in this case for the one who deposited the deeds and paid for having them recorded. According to the views of the learned judge, it would seem to be incumbent upon the grantee to supervise the work of the officer, or at least to examine the record when com-

[1] 44 Mo., 309. See, also, Lally *v.* Holland, 1 Swan (Tenn.), 396; Brydon *v.* Campbell, 40 Md., 331; Barnard *v.* Campau, 29 Mich., 162; Pringle *v.* Dunn, 37 Wis., 449; Van Thorniley *v.* Peters, 26 Ohio St., 471; Calder *v.* Chapman, 52 Pa. St., 359; Colomer *v.* Morgan, 13 La. An., 202; Succession of Cordeviolle *v.* Dawson, 26 id., 534; Fisher *v.* Tunnard, 25 id., 179; Verges *v.* Prejean, 24 id., 78; Grimstone *v.* Carter, 3 Paige, 421; Jennings *v.* Wood, 2 Ohio, 261; Miller *v.* Bradford, 12 Ia., 14; Hughes *v.* Dudnam, 8 Jones, 127; Peck *v.* Mallams, 10 N. Y., 509; Beekman *v.* Frost, 18 Johns., 544; Young *v.* Wilson, 27 N. Y., 351; S. C., 24 Barb., 510; Babcock *v.* Bridges, 29 Barb., 427; Pettibone *v.* Griswold, 4 Conn., 158; Hart *v.* Chalker, 14 Conn., 77; Viele *v.* Judson, 82 N. Y., 32. In some of the above cases the error by which the record was vitiated was in the original instrument.

pleted, and compare it with the original. The officer seems to act in the capacity of agent of the grantee.

§ 150. To Whom is the Officer Responsible for Errors?— If this were a purely speculative question, and not one which must be determined by the weight of authority, one might be led to inquire why it is that for such acts of nonfeasance or misfeasance these officers are not always required to answer to the same class of persons. As will presently appear, the innocent purchaser is in some instances regarded as the one whose rights are prejudiced by acts of negligence, somewhat similar to those treated of in the opinion above quoted, and the record remains unquestioned.[1]

§ 151. Different Construction of the Statute.— The case of Terrel *v.* Andrew County may be regarded as settling the law upon this question for the state within whose jurisdiction it was decided; but the principles upon which the decision is based not only may be questioned, but confronted by a very respectable array of authorities expressing opposite views.

§ 152. The Notice Unaffected by Errors in Recording.— In a case where the records had been mutilated and partially destroyed, BREESE, J., who delivered the opinion of the court, in commenting upon the doubts raised as to whether the deed had been properly recorded in the first instance, says: "But assuming that the deed was not properly recorded in the first instance, we then say that it is sufficient that the deed was left for record by the grantee."[2]

§ 153. Partial Omission.— So in another case arising in the same state, it was held that when the deed is left with the officer, the grantee has done all he is required to

[1] Throckmorton *v.* Price, 28 Tex., 605; Franklin *v.* Cannon, 1 Root (Conn.), 500. See, also, *infra*, § 152 *et seq.*; Temple *v.* The People, 6 Bradw., 378.

[2] Merrick *v.* Wallace, 19 Ill., 486; Weise *v.* Barker, 2 Pac. Rep., 919 (Colo.). See Gammon *v.* Hodges, 73 Ill., 140; Shannon *v.* Hall, 72 Ill., 354; Mims *v.* Mims, 35 Ala., 23.

do, and his rights will be protected though the recorder records only a part of the deed.[1]

§ **154. Entire Omission.**—So, also, was it held in the case of Throckmorton *v.* Price,[2] that a grantor leaving his deed for record is not bound to see that it is recorded. His filing it is regarded as equivalent to its registration so far as he is concerned, and his rights will be protected though it be not recorded at all.[3]

§ **155. Views of Early American Authorities, 1793.**—That there is no novelty in this view of the law will appear by consulting the earlier American authorities. In the case of Cannon *v.* Franklin,[4] decided in Connecticut as early as 1793, it was held, where a deed had remained for a long time in the office of the clerk without being recorded, through no fault of the grantee, that he should not be prejudiced by the negligence of the officer, but the deed should be regarded as recorded from the time it was left with the officer for that purpose.[5]

§ **156. Same—1794.**—In another case a mortgage was delivered to the clerk for registry, on June 26, 1766, and after an indorsement was made thereon to the effect that it was then duly registered, it was returned to the mortgagee. Subsequently, in the year 1771, the land was conveyed by the mortgagor to another, and the deed was recorded the same year. The land was conveyed by deed to still another purchaser, without notice, in 1772, and the deed recorded immediately; the purchaser going into possession in 1773. The mortgage was not actually copied upon the records until as late as 1794; yet in an action of ejectment by the mortgagee, he was held to be entitled to the possession, as he was not at fault in the matter of registration. The deposit of the mortgage with the clerk was all the duty which

[1] Riggs *v.* Boylan, 4 Biss., 445; Oats *v.* Walls, 28 Ark., 244.

[2] 28 Tex., 605; McGregor *v.* Hall, 3 Stewart & Porter (Ala.), 397.

[3] Pasch. Dig., § 210.

[4] 1 Root, 500.

[5] Hartmyer *v.* Gates, 1 Root, 61 [decided in 1774]; McDonald *v.* Leach, Kingley (Conn.) 72 [1786].

the law imposed upon him, and all subsequent purchasers were thereby constructively notified of the incumbrance.[1]

§ 157. Destruction of the Records Does Not Affect Notice.— It has also been decided that where the deed has been once recorded, a subsequent burning or other destruction of the records will not render the same ineffectual as notice to subsequent purchasers.[2] This latter position will hardly be disputed, yet it is supported by the same reasoning as that urged in defense of the constructive notice of a deed properly deposited for record, and omitted, or improperly transcribed, by a negligent officer.

§ 158. Effect of Error in Amount Secured by Mortgage.— Upon the other hand, it was decided where a clerk, in recording a mortgage, committed an error in transcribing the amount secured, and rendered it *three hundred* instead of *three thousand* dollars, that the record was only notice of the amount therein expressed.[3]

§ 159. Error in Description.— So where, in recording, a conveyance of the *east half* of a tract of land was recorded by mistake as the *west half*, the error was held to vitiate the record.[4]

§ 160. Fraudulent Concealment by Officer.— And even where the officer designedly, and for the purpose of concealment and fraud, copied a deed deposited with him for record into a book which was no longer used as a record of titles, the deed was held not to be recorded, and failed to impart notice constructively.[5]

§ 161. Immaterial Errors.— But mere clerical errors, such as a mistake in a letter in the name of a trustee in an assignment, or when the assignment is stated to be to one person and the *habendum* is to another, will certainly not

[1] Judd *v.* Woodruff, 2 Root, 298.

[2] Alvis *v.* Morrison, 63 Ill., 181; Shannon *v.* Hall, 72 Ill., 354; 22 Am. Rep., 146. See note to Alvis *v.* Morrison, 14 Am. Rep., 117.

[3] Frost *v.* Beekman, 1 Johns. Ch., 288; Beekman *v.* Frost, 18 Johns., 544; Peck *v.* Mallams, 10 N. Y., 509.

[4] Sanger *v.* Craigue, 10 Vt., 555.

[5] Sawyer *v.* Adams, 8 Vt., 172.

rob the record of its character as constructive notice.[1] So, where there is enough upon the record to put a prudent man upon inquiry, it has generally been held sufficient to amount to constructive notice, although the property is misdescribed in the record.[2]

§ 162. **Principle Governing Errors in the Record.**— In order to arrive at a correct conclusion, upon principle, in regard to the conflicting rights of prior and subsequent purchasers, as affected by the registry laws, one of the most pertinent inquiries is, *For whose benefit was the statute enacted?* Or, in other words, whom does it protect, and upon whom does it impose additional burdens? A brief glance at the common law *status* of the parties will answer these questions at once. The prior grantee was secure without the aid of the statute, whether the subsequent purchaser knew of the existence of his deed or not. The purchaser had the most imperfect means of ascertaining the condition of the title. The statute was interposed for the purpose of furnishing him with the necessary information, and in doing so it was found necessary to impose an additional obligation on the prior grantee. If, then, the law is primarily for the protection of the subsequent purchaser, it would seem that any breach of duty by the officer was a violation of his rights in the premises, and the delinquent official should be required to answer to him. The conclusion seems to follow inevitably, that, from the deposit of the instrument with the proper officer for record, it should be regarded as constructive notice to all persons who subsequently deal with the title, notwithstanding any errors by the officer in recording the instrument, or even when he neglects to record it at all. The effect of an error committed by the recorder must be carefully distinguished from the consequences of misleading errors in the original. Even where the statute makes the *filing* of the instrument notice to all persons subsequently dealing with the title, the error

[1] Wyatt *v.* Barwell, 19 Vesey, Jr., 435; Ince *v.* Everard, 6 T. R., 545.
[2] Partridge *v.* Smith, 2 Biss. C. Ct., 183.

by which the purchaser is misled takes effect as soon as the instrument is deposited with the officer. It is the fault of the party who gives the notice and not of the officer who transcribes the erroneous instrument. In the other case the duty of the grantee is fully accomplished when a perfect instrument is deposited in the hands of the proper officer, and he should not be held responsible for the latter's negligence in discharging a public duty.[1]

§ 163. **Failure to Record in Proper Time.**— So, where a time is fixed by law within which an instrument is required to be recorded in order to operate as notice to subsequent purchasers, and the officer, through press of business, negligence, or dishonest motives, fails to record it within such a time, his failure will not be allowed to work prejudice to the interests of the party who is interested in maintaining the validity of the record, when the instrument has been deposited with the recorder within the statutory period.[2]

§ 164. **The Index.**— There are other errors committed by the recording officers, scarcely less misleading in their character, or disastrous in their operation, than mistakes or omissions in copying the instruments filed for record. The index to the record is of such importance that without it the cost of employing a competent person to examine the records would, in some instances, equal, if not exceed, the value of the property to be conveyed. These are, in some cases, held to be essential parts of the records, in the absence of which subsequent purchasers would not be charged with notice.[3] In this case it was so held, though the question was not essential, and had nothing to do with a determination of the controversy; as the purchaser was charged with actual notice of the recorded but non-indexed mortgage. The question was also discussed in Schell *v.*

[1] Hughes *v.* Dudnam, 8 Jones, 127.
[2] Harrold *v.* Simons, 9 Mo., 326.
[3] Speer *v.* Evans, 47 Penn. St., 141.

Stein,[1] but no decisive conclusion arrived at, for the reason that in that case the deed was properly entered, as the statute required, in the index to the volume in which it was recorded, but was omitted from the general index kept by the recording officer, for which, however, the law made no provision. In this case the court regarded the officer as resting under an obligation to furnish the necessary information to searchers of the records, and if he voluntarily provided a general index, upon the correctness of which they were induced to rely, he was liable to such as were misled by failure to make entries therein according to his usual custom.

§ 165. Failure to Index Does Not Affect Record.— Where, however, the question has come up directly for decision, it has been held, in the majority of cases, that the failure to index is an act of misprision for which the officer is liable to the searcher of the records who is thereby misled to his injury.[2] The grounds upon which this is placed, in a recent case,[3] seem very reasonable. It is claimed that the ease with which what is on the records may be found is not a matter which concerns the owner of the deed, but rather the searcher of the records. The index is made for the benefit of the public who may desire to use it for the purpose of investigating the condition of titles to property, and not for the benefit of the owners of the property, who know that they have done all that the law requires of them in filing their evidence of title for record.[4]

§ 166. Error in Index Does Not Affect Record.— A case decided under the Iowa statute presents some striking if not perplexing features.[5] The statute provides for indexing all instruments filed. Such index to show the names of

[1] 76 Penn. St., 398.

[2] Curtis *v.* Lyman, 24 Vt., 338; Bishop *v.* Schneider, 46 Mo., 472; B'd of Com'rs *v.* Babcock, 5 Or., 472; Green *v.* Carrington, 16 Ohio St., 548; Speer *v.* Evans, 47 Pa. St., 141.

[3] Chatham *v.* Bradford, 50 Ga., 327.

[4] Mut. Life Ins. Co. *v.* Dake, 1 Abb. (N. C.), 381; Board of Com'rs *v.* Babcock, 5 Or., 472; Green *v.* Carrington, 16 Ohio St., 548.

[5] Barney *v.* Little, 15 Iowa, 527.

grantors and grantees, the time of filing, the date of the instrument, its character, and the book and page where the record may be found. The entries in the index, with the exception of the page, are completed before the instrument is required to be recorded *in extenso*. The views expressed by Judge DILLON in delivering the opinion of the court in this case are not in entire accord with the authorities hereinbefore cited. But the statute is peculiar in respect to the feature of indexing. Compliance with its requirements, in this particular, renders the entries made "constructive notice to all the world of the rights of the grantee conferred by such instrument," and the instrument may be copied into the records "as soon as practicable," after which the index entries are completed by inserting the number of the page upon which the instrument is recorded. In this instance the recording officer discharged his duties without substantial error or omission until he came to the final act required in order to complete the performance of his functions in connection with this particular deed. He entered the *wrong page* of the record opposite his entries in the index; so that instead of directing the attention of the examiner of the records to the page where the instrument, briefly described in the alphabetical index, was copied at length, he was referred to a different page where another deed was recorded, from the same grantor, but to a different grantee. This was held sufficient to put a purchaser upon inquiry, and by the dissimilarity between the names of parties as they appeared in the index and on the page referred to, suggest an error which would have been fully disclosed by a more careful search.

§ 167. **Failure to Index Under Iowa Statute.**— This would seem to be a stronger case in support of the validity of records, as constructive notice, regardless of the index, than that of Chatham *v.* Bradford, were it not for the reasoning by which it is supported. If an index, misleading on account of a palpable error, might not vitiate the record, it could be claimed, with a fair show of reason, that

a perfect record with *no* index would be valid. But this court, earlier in the same term, decided that a failure to index rendered the record void as to subsequent purchasers without actual notice.[1] This, too, under an earlier statute, which had not the same provisions as to indexing. The portion prescribing the manner of indexing was not, as it was in the later statute, preceded by the statement that no instrument affecting real estate should be of any validity against subsequent purchasers, etc., "unless recorded in the office of the recorder of deeds, in the county in which the land lies, *as hereinafter provided.*" The earlier statute also contained a provision that instruments required to be recorded should, "from the time of filing the same with the recorder, impart notice to all persons of the contents thereof." The court, however, in the case last cited, held, as in the case of Terrel *v.* Andrew County,[2] that the notice by filing was only temporary, and ceased when the instrument had been spread upon the records, and a failure to index rendered the record worthless. In so deciding, the eminent judge who delivered the opinion in both the Iowa cases followed the authorities in that state,[3] and has in turn been followed by others to the same effect.[4]

§ 168. Index Sufficient to Put Upon Inquiry.— Where, however, the requirements of the statute have been complied with in every substantial particular, a mere omission by the recording officer to make any of the entries in his index which the act prescribes, where such omission leaves enough to direct the attention of one who examines the index to the proper book and page, or is even sufficient to put a cautious or prudent man upon inquiry, the records will not be thereby rendered void, as notice to purchasers. As, where the description was omitted and instead thereof the recorder

[1] Barney *v.* McCarty, 15 Ia., 510.

[2] 44 Mo., 309.

[3] Miller *v.* Bradford, 12 Ia., 14; Noyes *v.* Harr, 13 id., 570; Breed *v.* Conley, 14 id., 269.

[4] Gwinn *v.* Turner, 18 Ia., 1; Whalley *v.* Small, 25 id., 184.

inserted the words, "see records." This was held not to be misleading, and hence did not vitiate the record.[1] So, too, where instead of the description were the words "certain lots of land," the court held this sufficient to put a purchaser upon inquiry, and hence to charge him with notice constructively.[2]

§ 169. **Index Held Part of the Record.**— In a case decided under a statute clothing the index with the character of notice to subsequent purchasers, it was held to be a record by which they were charged with constructive notice, even when there was a substantial error in the record itself.[3]

§ 170. **Grantee Cannot Control the Officer.**— It seems the more reasonable doctrine that the neglect of clerical duties by the officer should not be chargeable to the grantee or mortgagee, who, in depositing the instrument for record, does so in obedience to the mandate of the law. The doctrine of *respondeat superior* cannot apply as though the officer were the private agent or servant of the party whose deed is deposited. He is not chosen by the party depositing the instrument to perform the duties of filing, recording and indexing, but is designated by the law as the proper officer, and the grantee or mortgagee is compelled to apply to him and none other, and having done so, has no control whatever over his action.[4]

§ 171. **Mortgagee Not Affected by Officer's Failure.**— It has therefore been justly held, where the law made it incumbent upon the county clerk to number mortgages of chattels when deposited for record, that his failure to perform this duty in any instance should not impair the rights of the mortgagee, however much subsequent purchasers might be misled to their injury by the omission.[5]

§ 172. **Index No Part of the Record.**— So, also, where the statute required the clerk to make an index of the rec-

[1] Calvin *v.* Bowman, 10 Ia., 529; White *v.* Hampton, 13 id., 259.
[2] Bostwick *v.* Powers, 12 Ia., 456.
[3] Shove *v.* Larsen, 22 Wis., 142.
[4] *Infra.*
[5] Dodge *v.* Potter, 18 Barb., 193.

ords, it was held that this duty was prescribed for the purpose of furnishing facilities for those interested in searching the records. And that the index being no part of the records themselves, it was not essential that the instrument should be indexed in order to become constructive notice to subsequent parties.[1]

§ 173. **Same — Current of Authority.**— The fact that questions of this kind are decided by courts with different and independent jurisdiction, each construing its own statutes, may account, to some extent, for the diversity of opinion upon the importance of indexing the records. But the difference is too marked and decided to be altogether accounted for in this manner. It will be noticed that in neighboring states having registry laws with substantially the same provisions in this respect, the statutes have received opposite constructions. But the current of authority seems to be decidedly against the doctrine that the index is an essential part of the record.[2]

[1] Curtis *v.* Lyman, 24 Vt., 338.

[2] See cases cited *supra.*

V. Errors by the Party Filing the Instrument.

§ 174. Misleading Errors in Original.
175. Insufficient Description.
176. Errors in Numbering.
177. Description of Chattels.
178. Description of Debt Due.
179. Conditions Insufficiently Expressed.
180. Sufficient Certainty.
181. Approximate Certainty.
182. Mortgage Securing Future Advances.
183. Description Which May be Rendered Certain by Inquiry, Sufficient.
184. Errors Not Misleading.
185. Immaterial Where Purchaser Not Misled.
186. Instruments Should be Filed for Record in Their True Character.
187. Deed With Defeasance is Mortgage.
188. Defeasance Must be Recorded as Mortgage.
189. Parol Defeasance, Deed Recorded as Mortgage.
190. Sheriff's Deed Recorded as Mortgage, Insufficient.
191. Record of Secret Mortgage.
192. Must be Filed in Proper County.
193. Effect of Filing in Wrong County.
194. Deposit of Chattel Mortgage in Wrong Town.
195. Change of County, Subsequent to Filing, Will Not Affect Registry.

§ 174. Misleading Errors in Original.— There are errors, mistakes, omissions and ambiguities, such as are calculated to mislead an examiner of the records, for which the recording officer is in no way responsible. This is when the fault lies in the original. In such cases, if the discrepancy is of a substantial nature, the record is vitiated. As where the property intended to be conveyed was the *east half* of a lot, and was described in the deed as the *west half*, the record failed to give notice of the conveyance of the property intended.[1]

§ 175. Insufficient Description.— Also, where a transfer of a lease of real estate was made by a separate instrument, which, being a transfer of an interest in land, was entitled

[1] Sanger *v.* Craigue, 10 Vt., 555; Lally *v.* Holland, 1 Swan (Tenn.), 396.

to be recorded, it was held that in order to operate as constructive notice to subsequent purchasers, it should contain such a description, not only of the premises, but of the term, that the original lease could be recognized as the thing transferred.[1]

§ **176. Errors in Numbering.**— The purchaser at an execution sale of land previously conveyed by a deed in which the land is so indefinitely described or erroneously numbered that it cannot be identified, or is likely to be mistaken for another tract, is not affected by the record of such prior deed with notice of what was intended to be thereby conveyed.[2]

§ **177. Description of Chattels.**— The record of a mortgage of chattels, in order to operate as notice to subsequent purchasers, must contain such a description of the things included in the mortgage as to enable one examining the records to identify the property. As where cows were mortgaged and left in possession of the mortgagor, their calves, brought forth after the execution of the mortgage, would not be included therein unless mentioned.[3]

§ **178. Description of Debt Due.**— So, where the instrument was a mortgage, and the description of the debt secured was "a debt due from the mortgagor to the mortgagee by note, dated 10th of May, 1834, on demand, with interest," without specifying the amount, it was held not to be notice to subsequent purchasers of a valid security, for the reason that the spirit of the recording acts requires the record to disclose, with as much certainty as possible, the state of the incumbrances upon the property.[4]

§ **179. Conditions Insufficiently Expressed.**— So, also, where the condition of the mortgage was that the mortgagor should pay all notes indorsed by the mortgagee for

[1] Martindale *v.* Price, 14 Ind., 115.

[2] Bank *v.* Ammon, 27 Penn. St., 172; Nelson *v.* Wade, 21 Ia., 49; Herman *v.* Deming, 44 Conn., 124; Murphy *v.* Hendricks, 57 Ind., 593; Mundy *v.* Vawter, 3 Gratt., 518; Thorp *v.* Merrill, 21 Minn., 336; Rodgers *v.* Kavanaugh, 24 Ill., 583.

[3] Winter *v.* Landphere, 42 Ia., 471.

[4] Hart *v.* Chalker, 14 Conn., 77.

the mortgagor, and all receipts held by the mortgagee against the mortgagor, the record of such mortgage was held void as against creditors of the mortgagor.[1]

§ 180. **Sufficient Certainty.**— On the other hand, where the mortgage described the debts secured with such particularity that there could be no difficulty in determining by inquiry what debts were and what were not embraced in the description, the maxim, "That is certain which may be made certain," will be applied. It has accordingly been held not to be requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry.[2]

§ 181. **Approximate Certainty.**— And where the debt secured was described in the defeasance clause as follows: "If I shall well and truly pay to B., on demand, with interest, the sum of $1,500, which I am indebted to him, on book and by several notes, the exact date and amount not recollected, but amounting, in the whole, together with the debt on book, to the sum of $1,500 *or thereabouts*, then this deed shall be void;" and it appearing that when the mortgage was given the mortgagor was in failing circumstances and had not time to ascertain the precise amount to be secured, which was, in reality, in excess of $1,500, the mortgage was held valid as against other creditors and subsequent incumbrancers, and the record operated as notice to them to the extent of the amount mentioned therein.[3]

§ 182. **Mortgage Securing Future Advances.**— It has also been held that the record of a mortgage is not intended as notice of the amount due thereon, and is valid when future advances are secured, without specifying the amount with particularity.[4]

[1] Pettibone *v.* Griswold, 4 Conn., 158.

[2] Young *v.* Wilson, 27 N. Y., 351; Monell *v.* Smith, 5 Cow., 441; Robinson *v.* Williams, 22 N. Y., 380; Stoughton *v.* Pasco, 5 Conn., 442; Merrills *v.* Swift, 18 id., 257; United States *v.* Hooe, 3 Cranch, 73; Kramer *v.* Farmers' and Mechs.' Bank, 15 Ohio, 253.

[3] Merrills *v.* Swift, 18 Conn., 257.

[4] Bell *v.* Fleming, 12 N. J. Eq., 13.

§ 183. Description Which May be Rendered Certain by Inquiry, Sufficient.— In order that the record of a deed shall be vitiated by errors or uncertainty in the description, or other part of the original, the error must be in a matter of substance, or the uncertainty one which cannot be rendered certain by such inquiries as the record would naturally excite. So, where there was a contract to convey, in which the property was described as so many acres of "my land which I hold in the South Mountain, anywhere on the turnpike road between Newman's and the bridge over the Canadequingt creek," it was held that this gave the covenantee a right of selection within the prescribed limits, and the record of the instrument was constructive notice of that right.[1]

§ 184. Errors Not Misleading.— So, also, where, in a deed, the number of the town and range were transposed, so that there was no such piece of land in the county as described in the deed, it was held that the record of the deed disclosed enough to put a prudent man upon inquiry, and as such was sufficient notice to subsequent purchasers of the land actually intended to be conveyed.[2]

§ 185. Immaterial Where Purchaser Not Misled.— The error in the deed, in order to vitiate the record thereof, must be one calculated to mislead the purchaser. Therefore, if the purchaser had any knowledge of the error, or from his knowledge of the property and its surroundings, would have been able to interpret the record and give it the meaning it was supposed and intended to convey, it would be sufficient to charge him with notice.[3] As where a mistake in the record was discovered by the attorney of the subsequent purchaser, such mistake being in the description "West" instead of "North," the fact that this was easily recognized by the attorney of the purchaser while engaged

[1] Brotherton *v.* Livingston, 3 W. & S., 334.

[2] Partridge *v.* Smith, 2 Biss., 183. This is probably as strong a case as the rule will support.

[3] Erickson *v.* Rafferty, 79 Ill., 209.

in examining the records for his principal, manifested such a knowledge of the property and its situation that the mistake would not vitiate the record.[1]

§ 186. **Instruments Should be Filed for Record in Their True Character.**— Another important requirement in regard to the registry of instruments, in order that they may operate as constructive notice, is that they should be registered *in their true characters*. Otherwise they may fail to give notice, not only of the estate or interest they are intended to affect, but of that which they on their face purport to convey. As where an instrument is drawn and executed in the form of an absolute deed, which is intended only to take effect as a mortgage, it should be registered as a mortgage, and not as an absolute deed. The reason of this is that the instrument, not being an absolute conveyance of the property, its registry as such cannot charge any one with notice of its contents. It being in reality a mortgage, it should be recorded where the searcher for mortgeges would be most likely to find it — in the record of mortgages.[2]

§ 187. **Deed With Defeasance is Mortgage.**— So where there was a written defeasance to an absolute deed, and the deed was recorded among the absolute deeds, but the defeasance was unrecorded, the two instruments were treated as one, and that one a mortgage, which, not being properly recorded, through the negligence of the parties interested, was postponed to the lien of a subsequent judgment.[3]

§ 188. **Defeasance Must be Recorded as Mortgage.**— So, also, where a separate defeasance was recorded, but in

[1] Jones *v.* Bamford, 21 Ia., 217; Thornhill *v.* Burthe, 29 La. An., 639; Slater *v.* Breese, 36 Mich., 77; Shepard *v.* Shepard, 36 Mich., 173; Boon *v.* Pierpont, 28 N. J. Eq., 7.

[2] Dey *v.* Dunham, 2 Johns. Ch., 182; James *v.* Morey, 2 Cowen, 246; Manufacturers' Bank *v.* Bank of Pennsylvania, 7 Watts & Serg., 335.

[3] Friedly *v.* Hamilton, 17 Serg. & Rawle, 70; Brown *v.* Dean, 3 Wend., 208; Jaques *v.* Weeks, 7 Watts, 261; Edwards *v.* Trumbull, 50 Penn. St., 509. In Pennsylvania it would be held good for nothing, either as a conveyance or as a mortgage. Corpman *v.* Baccastow, 84 Pa. St., 363.

the same book with the deed instead of in the record of mortgages, it was held not to amount to constructive notice to a creditor, for the reason that it would not lie in his way if examining the record for mortgages.[1]

§ 189. Parol Defeasance, Deed Recorded as Mortgage.— And even where there is no written defeasance to the deed, but the contract to re-convey rests entirely in parol, though upon the face of it was an absolute deed; or when the mortgage is so imperfect in form as not to give adequate expression to the intention of the parties, still in either case the intention with which the instrument was drawn, being the true guide to its construction, will govern its registration. If recorded otherwise than as a mortgage, the record loses its character as constructive notice to purchasers or creditors.[2]

§ 190. Sheriff's Deed Recorded as Mortgage, Insufficient.— So, where a sheriff's deed was at his instance recorded in the mortgage book instead of the record of absolute deeds, it was held that this error rendered the record void, and if the deed were not properly recorded until after attachment by a creditor, the record could not affect the seizure.[3]

§ 191. Record of Secret Mortgage.— There is perhaps a stronger reason for discrediting the record of a secret mortgage because of its being recorded in the wrong book, than there would be for drawing the lines with the same strictness in cases where the fault lies entirely with the recording officer. In the one case the record is misleading, because the original instrument is designedly so; while in the other the honest intentions of the parties have been

[1] McLanahan *v.* Reeside, 9 Watts, 508; Grimstone *v.* Carter, 3 Paige, 421; Jackson *v.* Van Valkenburg, 8 Cow., 260; Hendrickson's Appeal, 24 Pa. St., 363; Corpman *v.* Baccastow, 84 Pa. St., 363; Cogan *v.* Cook, 22 Minn., 137.

[2] Shaw *v.* Wilshire, 65 Me., 485.

[3] Colomer *v.* Morgan, 13 La. Ann., 202.

defeated by the misprision of a public officer over whose acts they could have no control.[1]

§ 192. **Must be Filed in Proper County.**— Another important requisite to the validity of the record of an instrument is that it must be deposited for record in the county, town, parish or other place designated by law for the keeping of such records. Upon this rule the courts of the different states are almost, if not quite, uniformly agreed, however much they may disagree as to other details of their registry acts. So where, under the provisions of a statute requiring instruments affecting the title to land to be recorded in the town where the land was situated, though the registry elsewhere might be sufficient to charge those who had actually seen and read the record, it would not suffice to give that constructive notice for which the registry system was designed.[2]

§ 193. **Effect of Filing in Wrong County.**—Also, where a new county had been mapped out of another, and the land was situated in the new county, but a grantee not being advised of the change, which had been legally prescribed while the negotiations for the purchase were pending, deposited his deed for record in the old county instead of the new, its registration was held to be worthless as notice to those who were uninformed of the transfer.[3]

§ 194. **Deposit of Chattel Mortgage in Wrong Town.**— So, also, where mortgages of chattels were required by

[1] Purchaser without notice from grantee in absolute deed intended as mortgage, protected. Jaques *v.* Weeks, 7 Watts, 261; Orvis *v.* Newell, 17 Conn., 97; Bush *v.* Golden, 17 id., 594; Harrison *v.* Cachelin, 23 Mo., 117; Mesick *v.* Sunderland, 6 Cal., 297; Hart *v.* Farm. & Mech. Bank, 33 Vt., 252; Bailey *v.* Myrick, 50 Me., 171.

[2] Perrin *v.* Reed, 35 Vt., 2; King *v.* Portis, 77 N. C., 25; Astor *v.* Wells, 4 Wheat., 466; Lewis *v.* Baird, 3 McLean, 56; Stevens *v.* Brown, 3 Vt., 420; Kerns *v.* Swope, 2 Watts, 75; Hundley *v.* Mount, 8 Sm. & Mar., 387; Crosby *v.* Houston, 1 Tex., 203; St. John *v.* Conger, 40 Ill., 535; Stewart *v.* McSweeney, 14 Wis., 468.

[3] Astor *v.* Wells, 4 Wheat., 466; Stewart *v.* McSweeney, 14 Wis., 468.

statute to be recorded in the town where the mortgagor had his domicile, and a mortgage was given by two joint owners of certain articles of personal property, who resided in different towns, which mortgage was only recorded in the town in which one of such mortgagors was domiciled, the failure to record in both towns was held to render the mortgage void as against subsequent innocent purchasers.[1]

§ 195. Change of County Subsequent to Filing Will Not Affect Registry.— But, where the deed is deposited for record in the office of the recorder of the county in which the land is located at the time, and by a subsequent subdivision the land falls within the boundaries of another county, such change will not affect the validity of the registration.[2]

[1] Rich *v.* Roberts, 48 Me., 548.
[2] Milton *v.* Turner, 38 Tex., 81.

VI. Conflicting Titles Affected by Priority of Registration.

§ 196. Order of Priority Between Deeds.
197. Simultaneous Mortgages.
198. As Between Original Parties, Priority Subject to Stipulation.
199. Registration Will Not Divest Accrued Rights.
200. Innocent Purchaser Not Charged With Notice of Priorities Except by the Record.
201. Order of Filing Governs Priority.
202. Deed Recorded in Reasonable Time.
203. Subsequent Purchasers Alone Affected.
204. Record of Quitclaim.
205. The Instrument Must be in the Chain of Title.
206. Same, Further Illustrated.
207. Effect of Missing Link.
208. Record Imparts No Notice of Relations Between Parties.
209. Recitals of Material Facts Held Not to be Notice.
210. Example of Broken Chain of Title.
211. Example of Contrary Doctrine.
212. The Above Criticised.
213. Sheriff's Deed from Apparent Stranger.
214. Record of Conveyance Anterior to Grantor's Title.
215. Illustration of Same.
216. Contrary Doctrine Criticised.
217. Purchaser from Heir Without Notice of Ancestor's Unrecorded Deed.
218. Reasons Assigned for the Rule.
219. Reasons Assigned for Contrary Doctrine.
220. The Rule Sustained on Principle.
221. Review of Authorities.
222. Weight of Authority and Governing Principle.
223. Record of Conveyances Between Strangers Does Not Affect Purchasers.
224. Effect of Record of Instruments Affecting Chattels Follows Property.
225. Time Given for the Registration of Deeds.
226. Must be Purchaser for Value.
227. Assignee for Benefit of Creditors.
228. Creditors Purchasing at Execution Sale.
229. Purchasers at Execution Sale Notified by Registry Prior to Sale.
230. Interest of Mortgagee Not Affected by Bidding at Execution Sale.

§ 196. Order of Priority Between Deeds.— As between unregistered instruments affecting the title to real estate, the order of their priority will be governed by the order of their dates. As between registered instruments, however, they will generally take precedence in the order in which they are recorded.[1] So where there has been a sale of real estate by an insolvent debtor, for the purpose of defrauding his creditors, and the fraudulent grantee has conveyed the premises to an innocent purchaser for value, as between the creditors of the innocent debtor, and the innocent purchaser from the fraudulent grantee, the law will favor the most vigilant.[2]

§ 197. Simultaneous Mortgages.— So, also, where two mortgages on the same property were simultaneously given, with the understanding between the mortgagees and the mortgagor that the two were to take effect as separate and *equal* incumbrances, and that between them there was to be no priority, and subsequently one of the mortgagees recorded and then transferred his mortgage to a *bona fide* purchaser, who took without notice of the other, and who, in his turn, transferred the instrument to still another innocent purchaser, for value, before the other mortgage was recorded, it was held that the last purchaser might take advantage of the prior registration of his mortgage.[3]

§ 198. As Between Original Parties, Priority Subject to Stipulation.— In one case, where a mortgage and a judgment against the mortgagor were entered of record on the same day, it was held that, *prima facie*, they would be treated as taking effect simultaneously; but a verbal agreement between the parties that the mortgage was to have

[1] Lightner *v.* Mooney, 10 Watts, 407.

[2] Choteau *v.* Jones, 11 Ill., 300.

[3] Greene *v.* Deal, 4 Hun, 703. But see Greene *v.* Warnick, 64 N. Y., 220, where Greene *v.* Deal is reversed for the reason that the assignee of a mortgage is held to be entitled to the protection of the registry laws only with respect to a subsequent transfer of the same mortgage. See, also, Jones on Mortg., § 566.

precedence as notice would be binding upon them, though not upon a *bona fide* assignee of the judgment.[1]

§ 199. Registration Will Not Divest Accrued Rights.— Where a purchaser with notice of a prior unregistered conveyance from his grantor had his deed recorded first, and then conveyed to another who purchased without actual notice of the prior conveyance, and for a valuable consideration, it was held that if the first conveyance was recorded before his purchase, he would be charged with notice, notwithstanding the prior registration of his grantor's deed, and the deed to him would be void.[2] However, had the first mentioned purchaser taken his conveyance in good faith, his prior registry would have given him a perfect title, which would have passed to his grantee notwithstanding the subsequent registration of the prior deed.[3]

§ 200. Innocent Purchaser Not Charged With Notice of Priorities Except by the Record.— In another case, which seems to conflict with that of Van Rensselaer *v.* Clark, the land had been mortgaged, and before the mortgage was recorded the mortgagor conveyed it to another, and for a part of the purchase money took notes secured by a mortgage upon the premises from a purchaser who had actual notice of the first mortgage. This conveyance and the second mortgage were both recorded prior to the first. After the first mortgage was recorded, the notes secured by the second mortgage were transferred by indorsement to several successive purchasers with notice of the rights of prior parties, but the last indorsee had no other than constructive notice from the record of the first mortgage. Prior to the assignment of the notes, the second mortgagor conveyed his equity of redemption to a purchaser with notice. The holder of the notes was held to be charged with constructive notice of the first mortgage, but not with notice of the fact that the purchaser from the first mortgagor took with notice

[1] Hendrickson's Appeal, 24 Penn. St., 363.
[2] Van Rensselaer *v.* Clark, 17 Wend., 25.
[3] *Supra*, § 196.

of the prior unregistered incumbrance, so that, being an innocent holder, he was allowed to foreclose the mortgage by which the notes were secured.[1]

§ 201. **Order of Filing Governs Priority.**— Though it be true that generally a prior deed will be postponed to a subsequent one taken without notice when the latter is first recorded, yet this is only where the subsequent deed is first deposited for record by the purchaser. For the recording takes effect by relation back to the date of filing for record. And where two instruments affecting the title to the same and adversely to each other are filed for record, and the last filed is first spread upon the records through the negligence or corrupt design of the officer, no advantage will thereby accrue to the grantee in the deed so favored.[2]

§ 202. **Deed Recorded in Reasonable Time.**— Where a deed was executed before the property was attached, though the attachment took place twenty-four hours prior to the registry of the deed, it was held that, as the instrument was recorded in a reasonable time, it would take precedence and render the attachment void.[3]

§ 203. **Subsequent Purchaser Alone Affected.**— The only purchasers who are charged with notice by the registration of an instrument affecting the title to land are those who purchase subsequent to the deposit of the instrument with the registering officer.[4] The frequent announcement of the doctrine that the recording of an instrument affecting the title to land was "notice to all the world" has at times encouraged the belief that its operation might be so extended as to affect prior as well as subsequent pur-

[1] Day *v.* Clark, 25 Vt., 397.

[2] Warnock *v.* Wightman, 1 Brevard, 339; Jarves *v.* Aikens, 25 Vt., 635.

[3] Goodsell *v.* Sullivan, 40 Conn., 83.

[4] *Infra;* Hunter *v.* Watson, 12 Cal., 363; Howard Ins. Co. *v.* Halsey, 8 N. Y., 271; Hill *v.* McCarter, 27 N. J. Eq., 41; Van Orden *v.* Johnson, 1 McCarter, 376; Blair *v.* Ward, 10 N. J. Eq., 119; James *v.* Brown, 11 Mich., 25; Cooper *v.* Bigley, 13 id., 463; Doolittle *v.* Cook, 75 Ill., 354; Iglehart *v.* Crane, 42 id., 261; Denster *v.* McCamus, 14 Wis., 307; Straight *v.* Harris, id., 509; Halstead *v.* Bank of Kentucky, 4 J. J. Marsh., 554.

chasers or mortgagees, and thus control their action with reference to the property in which they claimed an interest. But neither the letter nor the spirit of the recording acts can be supposed to have reference to prior deeds or mortgages already recorded. The effect of recording a conveyance is not intended to be retrospective. The recording of a mortgage is not constructive notice to a prior mortgagee whose mortgage is already recorded. And yet the courts of equity have been asked, for the purpose of granting peculiar relief to subsequent mortgagees, to give such a construction to the statute as would entirely invert the operation of its provisions. The propriety of this construction has been claimed in furtherance of the equitable doctrine that mortgagees, where the same mortgage covers several parcels of land, are required to subject the mortgaged premises to the payment of their demands in the inverse order of their alienation. Or, in other words, when a mortgagee, with notice of the equitable rights of subsequent purchasers or incumbrancers, releases one of several parcels of land mortgaged for the same debt of which the mortgagor still holds the equity of redemption, unincumbered by a subsequent mortgage, being primarily liable for the debt, he will not be permitted to enforce his demand against other parcels included in his mortgage which have been conveyed or incumbered subsequent to the first mortgage, without first deducting from his debt the value of the parcels released by him; for the reason that the release would impose an additional burden upon that portion still held.[1] But the recognition of this doctrine does not carry with it the admission of the record of the subsequent incumbrance, as a substitute for the actual notice which would be necessary to affect the conscience of the prior mortgagee and render his act in releasing the portion of the mort-

[1] Stuyvesant *v.* Hone, 2 Barb. Ch., 151; Taylor *v.* Maris' Ex'rs, 5 Rawle, 51; Cheeseborough *v.* Millard, 1 Johns. Ch., 409; Guion *v.* Knapp, 6 Paige, 35; Blair *v.* Ward, 10 N. J. Eq., 119; Ward's Ex'r *v.* Hague, 25 N. J. Eq., 397.

gaged premises primarily liable, a fraud upon subsequent purchasers or mortgagees. He is not required to search the record for instruments recorded subsequently to his own which may affect the title.[1] Hence when the owner of premises conveyed the same by quitclaim deed, which was not recorded, and subsequently, for value received, conveyed the same premises by quitclaim to another, it was very properly held that the latter's deed had no effect whatever on the title of the original grantee.[2] A quitclaim deed is limited in effect by its own terms to the title remaining in the grantor at the time, and it is quite clear that no title remains after it has been conveyed even by a quitclaim.

§ **204. Record of Quitclaim.**—The record of an instrument is constructive notice of what the record shows, and nothing more. So, where a quitclaim deed has been filed for registration, and is duly spread upon the records, this amounts to notice simply that the grantor's interest in the land therein described was thereby conveyed to the grantee, and not that the grantor had any title thereto.[3]

§ **205. The Instrument Must be in the Chain of Title.**—Nor will the putting on record a deed from one who had no record title affect the conscience of a subsequent purchaser of the legal title, nor charge that title with any equities which the deed may have raised between the bargainor and the bargainee. In other words, the record is only constructive

[1] Stuyvesant *v.* Hone, 1 Sandf. Ch., 419; Taylor *v.* Maris, 5 Rawle, 51; Stuyvesant *v.* Hone, 2 Barb. Ch., 151; Blair *v.* Ward, 10 N. J. Eq., 119; George *v.* Wood, 9 Allen, 80; Howard Ins. Co. *v.* Halsey, 8 N. Y., 271; James *v.* Brown, 11 Mich., 25; Birnie *v.* Main, 29 Ark., 591; Flynt *v.* Arnold, 2 Metc., 619; Mahoney *v.* Middleton, 41 Cal., 41; Fallas *v.* Pierce, 30 Wis., 443; Sims *v.* Hammond, 33 Ia., 368; Goelet *v.* McManus, 1 Hun, 306; Ring *v.* Steele, 3 Keyes, 450; Schutt *v.* Large, 6 Barb., 373; (overruling) Connecticut *v.* Bradish, 14 Mass., 296; Trull *v.* Bigelow, 16 id., 406; Gliddon *v.* Hunt, 24 Pick., 221; Ely *v.* Wilcox, 20 Wis., 523.

[2] Marshall *v.* Roberts, 18 Minn., 405; 10 Am. Rep., 201.

[3] Hutchinson *v.* Harttman, 15 Kans., 133; Stuyvesant *v.* Hone, 1 Sand. Ch., 419.

notice to those claiming under the same grantor.[1] Except in cases where the title of such grantor is one which has ripened to perfection from adverse possession.[2]

§ **206. Same, Further Illustrated.**— The principle stated above may be further illustrated by a case where the contest was between an attaching creditor, and a purchaser whose deed was recorded prior to the attachment. But the grantor of this purchaser had himself purchased from the debtor of the attaching creditor, and had failed to file his deed for record. As a consequence of this omission the record disclosed no conveyance from the debtor, and it was held that the record of the deed to the last purchaser did not amount to constructive notice of the unrecorded deed to his grantor.[3]

§ **207. Effect of Missing Link.**— So, where the deed from the vendor is not recorded, a deed of trust, or mortgage given by his vendee for the purchase money, will not be notice to subsequent purchasers of the unrecorded deed. There is a break in the chain of title. A necessary link is wanting in order to connect the mortgagor with the title. There is nothing to guide the purchaser beyond the record

[1] Crockett *v.* Maguire, 10 Mo., 34; Roberts *v.* Bourne, 23 Me., 165; Veazie *v.* Parker, id., 170; Pierce *v.* Taylor, id., 246; Leach *v.* Beattie, 33 Vt., 195; Losey *v.* Simpson, 11 N. J. (Eq.), 246; Long *v.* Dollarhide, 24 Cal., 218; Rogers *v.* Burchard, 34 Tex., 441; Baker *v.* Griffin, 50 Miss., 158.

[2] Baker *v.* Griffin, 50 Miss., 158; Embury *v.* Conner, 2 Sandf., 98; Farmers' Loan, etc., Co. *v.* Maltby, 8 Paige, 361; Cook *v.* Travis, 20 N. Y., 402; St. John *v.* Conger, 40 Ill., 535; Brock *v.* Headen, 13 Ala., 370; Dolin *v.* Gardner, 15 Ala., 758; Fenno *v.* Sayre, 3 Ala., 478; Digman *v.* McCollum, 47 Mo., 372; McCoy *v.* Trustees, etc., 5 S. & R., 254; Tilton *v.* Hunter, 24 Me., 29; Blake *v.* Graham, 6 Ohio St., 580; Leiby *v.* Wolf, 10 Ohio, 83; Hetherington *v.* Clark, 30 Penn. St., 393; Bates *v.* Norcross, 14 Pick., 224.

[3] George *v.* Wood, 9 Allen, 80; Felton *v.* Pitman, 14 Ga., 530; Chicago *v.* Witt, 75 Ill., 211; Page *v.* Waring, 76 N. Y., 463; Calder *v.* Chapman, 52 Pa. St., 359; Keller *v.* Nutz, 5 S. & R., 246; Blake *v.* Graham, 6 Ohio St., 580; Harris *v.* Arnold, 1 R. I., 125; Roberts *v.* Bourne, 23 Me., 165.

title of the vendor, and the discovery of the mortgage for the purchase money would be purely accidental.[1]

§ 208. Record Imparts No Notice of Relations Between Parties.— The constructive notice by registration does not necessarily imply knowledge, on the part of subsequent purchasers, of the relations subsisting between the parties to the recorded instrument. So, where a mortgage was given by A. and B. on several pieces of land owned by them in severalty, to secure their joint note, which was executed by B. as surety for A., and subsequently A. gave a second mortgage on his land, and B., by reason of his being surety for A., claimed that he was entitled to pay off the first mortgage, and be subrogated to all the rights of the first mortgagee for his indemnity, thereby taking precedence of the second mortgagee, it was held that, as the record imparted no constructive notice of his suretyship, and actual notice thereof was not proven, innocent purchasers or incumbrancers could not be affected.[2]

§ 209. Recitals of Material Facts Held Not to be Notice.— It has even been held that the record is not always constructive notice of all it contains material to the title. As where there was a recital in the body of a deed, which

[1] Veazie *v.* Parker, 23 Me., 170; Pierce *v.* Tayor, id., 246; Felton *v.* Pitman, 14 Ga., 530; De Yampert *v.* Brown, 28 Ark., 166; Bazemore *v.* Davis, 55 Ga., 504; Whittington *v.* Wright, 9 Ga., 23; Crockett *v.* Maguire, 10 Mo., 34; Rogers *v.* Burchard, 34 Tex., 441; Losey *v.* Simpson, 11 N. J. Eq., 246; Bates *v.* Norcross, 14 Pick., 224; Quirk *v.* Thomas, 6 Mich., 76.

[2] Bancroft *v.* Cousen, 13 Allen, 50; Harrison *v.* Cachelin, 23 Mo., 117; George *v.* Kent, 7 Allen, 16; Morris *v.* Wadsworth, 17 Wend., 103; Dimon *v.* Dunn, 15 N. Y., 498; Humphreys *v.* Newman, 51 Me., 40; Thomson *v.* Wilcox, 7 Lans., 376; Hall *v.* McDuff, 24 Me., 311; Barbour *v.* Nichols, 3 R. I., 187; Bolles *v.* Chauncey, 8 Conn., 389; Peters *v.* Goodrich, 3 Conn., 146; Tripe *v.* Marcy, 39 N. H., 439; Souder *v.* Morrow, 33 Pa. St., 83; Leach *v.* Beattie, 33 Vt., 195; Clabaugh *v.* Byerly, 7 Gill, 354; Kyle *v.* Thompson, 11 Ohio St., 610; Grandin *v.* Anderson, 15 Ohio St., 286; Doyle *v.* Stevens, 4 Mich., 87; Buchanan *v.* International Bank, 78 Ill., 500; McCabe *v.* Grey, 20 Cal., 509; Dennis *v.* Burritt, 6 Cal., 670; Montefiore *v.* Browne, 7 H. L. Cas., 241; Orvis *v.* Newell, 17 Conn., 97.

disclosed the fact that a prior mortgage had been given on the same premises, and such mortgage was unrecorded, the recital was not treated as constructive notice to subsequent purchasers, of the existence of the mortgage.[1]

§ 210. **Example of Broken Chain of Title.**— In a recent case, where there was an outstanding unrecorded deed of the premises and a deed duly recorded from the grantee to another person, and also a deed from this other person to still another, which last was likewise recorded, it was sought to charge an innocent purchaser, by the record of these two deeds, with constructive notice of the prior unrecorded deed. From the report of the case it seems that before completing the transaction, the purchaser sought to be charged obtained an abstract of the title, in which both these conveyances, the one from the grantee in the unrecorded deed and that from his grantee, were mentioned. It further appears that in neither of these was there any recital of the unrecorded instrument which formed a necessary link in the chain of title. It was held that the conveyance appearing of record did not operate as constructive notice of the unrecorded instrument under which they both held; but in reaching this conclusion the court intimated that the case might have been differently decided had there been a recital of the unrecorded instrument in those appearing of record.[2] It is impossible to gather from the report of the case cited whether or not the fact that the purchaser had been furnished with an abstract of the title was insisted upon as actual notice. What seems to have been in dispute, however, was whether the record of the deeds from parties who, for all that appeared of record, were strangers to the title, was constructive notice of the unrecorded deed. In cases where this issue alone has been raised, it has been almost uniformly decided that even the recitals in detached instruments, however explicitly they may refer to prior unrecorded instruments affecting the title, will not charge

[1] Crofut *v.* Wood, 3 Hun, 571. See S. C., 65 N. Y., 437.

[2] Chicago *v.* Witt, 75 Ill., 211. See, also, Doolittle *v.* Cook, id., 354.

subsequent purchasers with constructive notice of the facts therein recited.[1]

§ 211. **Example of Contrary Doctrine.**— The views expressed by the court in a still more recent case seem to be directly at variance with the weight of authority upon this question.[2] The controversy lay between the plaintiff claiming by adverse possession, under color of title, and defendant, a purchaser at an execution sale. The plaintiff held a deed, duly acknowledged and recorded, from a purchaser at a prior execution sale. In attempting to execute the deed to the first purchaser the sheriff omitted to affix the seal or scroll, which was imperatively required to give validity to the deed. This omission the court declared rendered the deed a nullity.[3] And being an attempted execution of a statutory power in derogation of a common law right, equity would not aid its imperfect execution.[4] It was not the conveyance of an equitable interest, as it would have been had the deed been a voluntary one, and the seal omitted by mistake.[5] This void deed, however, was copied upon the records before the purchase by the defendant, as was also the deed from plaintiff's grantor. It is not clear from the report of the case whether the defendant, prior to his purchase, had ever seen the record copy of the sheriff's deed; but the court held that, as the deed to plaintiff recited the former judgment, execution and sale, described the land correctly, and stated that the first sheriff's deed was executed, it was sufficient to put defendant upon inquiry, which would have resulted in a knowledge of plaintiff's claim, and was consequently constructive notice to him.

[1] Losey *v.* Simpson, 11 N. J. Eq., 246; Keller *v.* Nutz, 5 S. & R., 246; Maul *v.* Rider, 59 Penn. St., 167; Long *v.* Dollarhide, 24 Cal., 218; Fenno *v.* Sayre, 3 Ala., 458; Tilton *v.* Hunter, 24 Me., 29; Ely *v.* Wilcox, 20 Wis., 530.

[2] Hamilton *v.* Boggess, 63 Mo., 233.

[3] Allen *v.* Moss, 27 Mo., 354.

[4] Moreau *v.* Detchemendy, 18 Mo., 522; Moreau *v.* Branham, 27 Mo., 351.

[5] McClurg *v.* Phillips, 57 Mo., 214.

§ 212. **The Above Criticised.**— The views expressed by the court in this case seem irreconcilable with those previously expressed by the same and other courts, upon any other hypothesis than that defendant had actual notice of the record. The case might have been decided by leaving entirely out of consideration the question of constructive notice by registration, and resting upon plaintiff's adverse possession, which seems, from the instruction reported, to have been the view taken by the court below. If it is true, as we have seen, that the record is only constructive notice to those claiming to purchase under the same grantor,[1] the record of the plaintiff's deed could not have been constructive notice to one purchasing at the last execution sale, because it was from one who, so far as the record disclosed, was a stranger to the title. Neither its recitals nor the unauthorized record of the void sheriff's deed, nor both these together, could connect the plaintiff's deed with the title of the judgment debtor under whom the defendant claimed. The deed from the purchaser at the first execution sale was properly recorded, it is true; but between it and the title of the judgment debtor there was a blank. In order to make the record of its recitals constructive notice, the same operation must be given to the record of the void deed as to a valid one, or else there is nothing to lead the searcher of the records to a knowledge of the fact by which he is to be bound.

§ 213. **Sheriff's Deed from Apparent Stranger.**— The record of a deed from a sheriff, pursuant to an execution sale, will not be notice to a subsequent purchaser, when the title acquired by such subsequent purchase is derived from a different source, and there is nothing appearing of record connecting the execution debtor with the title. As, where certain land was paid for with the money of a judgment debtor, and at his request conveyed to another, in trust for his wife, for the purpose of defrauding his creditors, and

[1] *Supra*, § 205 *et seq.*; *infra*, § 213.

the land was sold on execution against the husband, and subsequently purchased from the trustee and the wife by one having no actual notice of the equity of the husband or of the sheriff's sale, the record of the deed from the sheriff would not charge such subsequent purchaser with constructive notice of anything by which his title might be affected.[1]

§ 214. Record of Conveyance Anterior to Grantor's Title.— The purchaser is not charged with notice from the record of conveyances from his grantor prior to such grantor's acquisition of title.[2] In such case the subsequent purchaser would not be estopped by the record of a mortgage from his grantor prior to the date of his grantor's deed. To hold otherwise would be to impose upon the purchaser the duty of examining the records indefinitely.[3]

§ 215. Illustration of Same.— So, in a case where a tract of land was conveyed by deed to A., with the exception of a certain lot included in the general boundaries, and the deed was duly recorded, after which A. mortgaged the entire tract to B., this mortgage was also placed upon record. Subsequently A. purchased the lot. C. held a judgment against A. The entire tract was sold to satisfy the mortgage claim, and the lot was sold to satisfy the judgment. In a contest between the purchaser at the mortgage sale and the purchaser at the execution sale, it was held that the latter by his purchase acquired the better title to the lot. He was only constructively notified by the

[1] Crockett *v.* Maguire, 10 Mo., 34.

[2] Loan & Trust Co. *v.* Maltby, 8 Paige, 361; Faircloth *v.* Jordon, 18 Ga., 850.

[3] Hetzel *v.* Barber, 69 N. Y., 1; Buckingham *v.* Hanna, 2 Ohio St., 551; Doswell *v.* Buchanan, 3 Leigh, 365. But see Pike *v.* Galvin, 29 Me., 183; Wark *v.* Willard, 13 N. H., 389; Kimball *v.* Blaisdell, 5 N. H., 533; Jarves *v.* Aikens, 25 Vt., 635; White *v.* Patten, 24 Pick., 324; Somes *v.* Skinner, 3 Pick., 52; Doyle *v.* Peerless, etc., Co., 44 Barb., 239; Digman *v.* McCollum, 47 Mo., 372; Duchess of Kingston's Case, 2 Smith's Lead. Cases (7th Am. ed.), 705.

record of incumbrances placed upon the lot by the judgment debtor subsequent to his acquisition of title.[1]

§ 216. Contrary Doctrine Criticised.— The doctrine of estoppel by deed was applied to a case similar to the foregoing, and it was held by a divided commission that the record of a mortgage, prior to the purchase of the premises by the mortgagor, was binding upon privies in blood, privies in estate, and privies in law, after the title was acquired by the mortgagor.[2] But upon both principle and authority, it seems more consonant with the spirit of the recording acts to absolve purchasers from the duty of examining the records for conveyances from their grantors, prior to the time when they had a title to convey.

§ 217. Purchaser from Heir Without Notice of Ancestor's Unrecorded Deed.— Where the grantor of real estate dies, and the deed is not recorded, it has been held that a subsequent purchaser from the heir for a valuable consideration, and without notice of the unrecorded deed, would be protected to the same extent as though he had purchased from the ancestor under similar circumstances.[3]

§ 218. Reasons Assigned for the Rule.— The following are the principal reasons assigned for thus holding: The heir stands in the shoes of his ancestor. The title to the real estate descends to him immediately on the death of the ancestor. When the purchaser ascertains who is the sole heir, he would ordinarily be willing to treat with him much as he would have treated with the ancestor in his

[1] Calder *v.* Chapman, 52 Penn. St., 359.

[2] Tefft *v.* Munson, 57 N. Y., 97, citing upon the general doctrine of estoppel by deed against mortgagor, Wark *v.* Willard, 13 N. H., 389; Kimball *v.* Blaisdell, 5 id., 533; Somes *v.* Skinner, 3 Pick., 52; Bank of Utica *v.* Merserean, 3 Barb. Ch., 528; Jackson *v.* Bull, 1 Johns. Cas., 81; White *v.* Patten, 24 Pick., 324; Pike *v.* Galvin, 29 Me., 183.

[3] McCulloch *v.* Eudaly, 3 Yerg., 346; Powers *v.* McFerran, 2 Serg. & Rawle, 44; Kenedy *v.* Northup, 15 Ill., 148; Rupert *v.* Mark, id., 540; Youngblood *v.* Vastine, 46 Mo., 239; Chadwick *v.* Turner, 1 Ch. Ap. Cas., 310.

life-time. It is true that the heir could not hold the property as against his ancestor's grantee whose deed was unregistered. In this respect he is in neither a better nor a worse condition than his ancestor while living. If the real estate of which one dies apparently seized is to remain forever subject to unrecorded instruments affecting the title, the benefit to be derived from the registry laws is utterly lost as soon as the title is cast by descent. If one hold a deed to land which is unregistered at the death of his grantor, unless subsequent purchasers from the heir are protected, the same as subsequent purchasers from the ancestor, it need never be registered, in order to protect the grantee's title. It is believed that it was never intended by any of the recording acts, that the death of a grantor should be allowed to create a break in the chain of title, as it appeared of record, and protect the grantee whose deed was unregistered against subsequent purchasers without notice. The only question is, whether a contrary intention is sufficiently expressed in the statute.

§ 219. **Reason Assigned for Contrary Doctrine.**— It has been held that the grantee of the heir will not be protected in his title against the claim of the ancestor's grantee or mortgagee whose deed or mortgage is unrecorded, because the language of the statute does not warrant such an interpretation.[1] Though it is admitted that a purchaser at administrator's sale, who has his deed first recorded, will be protected against claims under prior unregistered instruments, it is said the heir has nothing to convey.[2]

§ 220. **The Rule Sustained on Principle.**— The language of the statute usually is in substance that no instrument affecting the title to real estate shall be effectual as against any persons except grantors, and their heirs, unless

[1] Webb *v.* Wilcher, 33 Ga., 565; Hill *v.* Meeker, 24 Conn., 211; Ralls *v.* Graham, 4 Mon., 120; Hancock *v.* Beverly, 6 B. Mon., 531; Harlan *v.* Seaton, 18 id., 312.

[2] Tucker *v.* Harris, 13 Ga., 1; Caldwell *v.* Head, 17 Mo., 561; McCamant *v.* Patterson, 39 id., 100; Gibson *v.* Choteau, id., 536.

recorded in the manner prescribed. It is argued in those cases where protection is denied to innocent purchasers from heirs, that the title passes by the execution and delivery of the deed and not by its registration; therefore, the ancestor having divested himself of all title to the premises during his life-time, at his death nothing descended to the heir which he could convey. By the same rule no title remained in the ancestor which he could convey; yet if he attempted it, the subsequent innocent purchaser, by the exercise of proper diligence in filing his deed for record, could secure the title.

§ 221. **Review of Authorities.**— In the case of Harlan *v.* Seaton,[1] the court does not attempt a vigorous defense, upon principle, of the position assumed, but virtually yields to the doctrine of *stare decisis*. Early decisions of the same question by the same court are followed, for the declared reason that they have established a rule of property in that state, and it is deemed better that the law should remain permanent, even though originally settled upon doubtful principles.

§ 222. **Weight of Authority and Governing Principle.**— As between these conflicting views, the weight of authority seems to be in favor of extending the same protection to *bona fide* purchasers from the heirs of a deceased grantor, where the prior deed is unregistered, as is afforded to subsequent purchasers from the grantor himself. This view seems also to be supported by the better reason. Following the record as a guide, the title seems to be in the heir at the moment of the ancestor's death. It is true that, as against his ancestor's grantee, he has no title at all; but the same could be said with equal truth of the grantor himself where the subsequent deed is from him. It is probable, however, that the courts of each state where the question has been once decided will generally adhere to its own construction of the statute, as best calculated to insure permanency in the laws governing property — though the case of Young-

[1] *Supra*, § 219.

blood *v.* Vastine,[1] being the latest decision of the court where it was decided, flatly overrules the earlier cases cited[2] in which a contrary view is expressed by the same court.

§ 223. Record of Conveyances Between Strangers Does Not Affect Purchasers.— The record of a conveyance from one stranger to the title, to another, does not affect a subsequent purchaser who claims under a different grantor.[3] A fair illustration of this doctrine is found in the case of Blake *v.* Graham.[4] In that case there had been an unauthorized deed executed by an executor in Pennsylvania, of lands in Ohio, which deed was recorded in Ohio; but it was held to be of no avail as notice to purchasers from the heirs of the testator.[5]

§ 224. Effect of Record of Instruments Affecting Chattels Follows Property.— Ante-nuptial contracts of such a nature as to be binding upon the parties, affecting the title to chattels, when properly acknowledged and recorded in the state where the property is situated at the time, have been held to follow the chattels when removed to another state, and operate as constructive notice in the new locality.[6] So where personal property is mortgaged in one state according to the laws thereof, and duly recorded, the rights of the mortgagee are preserved after the removal of the property to another state.[7]

§ 225. Time Given for the Registration of Deeds.— Where the statute prescribes a time within which the deed to be operative as notice to subsequent purchasers shall be

[1] 46 Mo., 239.

[2] Caldwell *v.* Head, and McCamant *v.* Patterson, *supra*, § 219.

[3] McCoy *v.* Trustees, etc., 5 S. & R., 254; Tilton *v.* Hunter, 24 Me., 29; Leiby *v.* Wolf, 10 Ohio, 83; Hetherington *v.* Clark, 30 Penn. St., 393; Bates *v.* Norcross, 14 Pick., 224.

[4] 6 Ohio St., 580.

[5] Leiby *v.* Wolf, 10 Ohio, 83; Hetherington *v.* Clark, 30 Penn. St., 393; Bates *v.* Norcross, 14 Pick., 224.

[6] DeLane *v.* Moore, 14 How., 253; Hicks *v.* Skinner 71 N. C., 539.

[7] Hall *v.* Pillow, 31 Ark., 32; Feurt *v.* Rowell, 62 Mo., 524.

filed for record, it is given a retrospective effect from the date of filing (if within the prescribed time) back to the date of the deed, and is held to take precedence of instruments of subsequent date, even though the latter be first filed for record. The same advantage, however, is not always accorded to mortgages and deeds of trust, as these are held to be constructive notice only from the time they are lodged with the proper officer for registration.[1] Where a time is fixed for recording instruments, and they are not recorded until after the expiration of the statutory period, they are generally held to be notice to purchasers and incumbrancers subsequent to their being filed for record.[2]

§ 226. **Must be Purchaser for Value.**—It is not every one who may be technically styled a subsequent purchaser that will be allowed to take advantage of the fact that a prior deed to the same premises is unregistered. It is not sufficient that he is a purchaser without notice. He must also be a purchaser who has parted with value.[3] But the record of a voluntary conveyance will be as effective for

[1] Claiborne *v.* Holmes, 51 Miss., 146; Stansell *v.* Roberts, 13 Ohio, 148; Mayham *v.* Coombs, 14 id., 428; Coster *v.* Bank of Georgia, 24 Ala., 37; De Vendal *v.* Malone, 25 Ala., 272; Gray's Adm'r *v.* Cruise, 36 Ala., 559.

[2] Hardaway *v.* Semmes, 24 Ga., 305; Doe *v.* Bank of Cleveland, 3 McLean, 140; Williams *v.* Adams, 43 Ga., 407; Allen *v.* Holding, 29 Ga., 485; Rushim *v.* Shields, 11 Ga., 636; Burkhalter *v.* Ector, 25 Ga., 55; Williams *v.* Logan, 32 Ga., 165; Lee *v.* Cato, 27 Ga., 637; Wyatt *v.* Elam, 19 Ga., 335; Smith *v.* Smith, 13 Ohio St., 532; Lessee of Allen *v.* Parish, 3 Ohio, 107; Lessee of Cunningham *v.* Buckingham, 1 Ohio, 264; Lessee of Irvin *v.* Smith, 17 Ohio, 226; Northrup's Lessee *v.* Brehmer, 8 Ohio, 392; Spader *v.* Lawler, 17 Ohio, 371; Bloom *v.* Noggle, 4 Ohio St., 45; Price *v.* Methodist Episcopal Ch., 4 Ohio, 515; Bercaw *v.* Cockerill, 20 Ohio St., 163; Owens *v.* Miller, 29 Md., 144; Knell *v.* Building Ass'n, 34 Md., 67; Leppoc *v.* Nat. Union Bank, 32 Md., 136; Lester *v.* Hardesty, 29 Md., 50; Adm'rs of Carson *v.* Phelps, 40 Md., 97; Estate of Leiman, 32 Md., 225.

[3] Aubuchon *v.* Bender, 44 Mo., 560; Setter *v.* Alvey, 15 Kans., 157; Martin *v.* Sale, 1 Bailey's Eq., 1; Hoffman *v.* Strohecker, 7 Watts, 90; Snider *v.* Snider, 3 Phila., 160; Union Canal Co. *v.* Young, 1 Whart., 432.

the purpose of giving notice to subsequent parties, as though it were for a valuable consideration.[1]

§ 227. **Assignee for Benefit of Creditor.**— In thus restricting the operation of the statute, it has been held that an assignee for the benefit of creditors is not a purchaser for value, and therefore such an assignment would be postponed to a prior unrecorded mortgage.[2]

§ 228. **Creditor Purchasing at Execution Sale.**— And so where, at an execution sale, the creditor was the purchaser, and the amount for which the purchase was made was credited on his judgment, it was held that he was not a purchaser for a valuable consideration, and was not entitled to the protection of the registry laws.[3]

§ 229. **Purchasers at Execution Sale Notified by Registry Prior to Sale.**— But whoever is the purchaser at execution sale, whether he be a creditor or not, is charged with constructive notice of all instruments affecting the title, executed and delivered by the debtor prior to the judgment, and subsequently recorded, provided such instruments are recorded prior to the sale.[4]

§ 230. **Interest of Mortgagee Not Affected by Bidding at Execution Sale.**—So it has been held that where a mortgagee whose mortgage had been registered prior to the execution sale, but subsequently to the docketing of the judgment, attended and bid at the sale, his interest was not affected by such silence or apparent acquiescence, though had the mortgage remained unrecorded until after the sale, the purchaser, if without notice, would have taken the property freed from the incumbrance.[5]

[1] Beal *v.* Warren, 2 Gray, 447. See Mayor *v.* Williams, 6 Md., 235; Cooke's Lessee *v.* Kell, 13 Md., 469; Williams *v.* Bank, 11 Md., 198; *supra*, § 118.

[2] Mellon's Appeal, 32 Penn. St., 121; Britton's Appeal, 45 Penn. St., 172.

[3] Ayers *v.* Duprey, 27 Tex., 593. In general a purchaser at an execution sale is affected with notice of all the infirmities in the title of the judgment debtor. Richardson *v.* Wicker, 74 N. C., 278.

[4] Thomas *v.* Kennedy, 24 Ia., 397; Jackson *v.* Post, 15 Wend., 588.

[5] Jackson *v.* Dubois, 4 Johns., 216; Knouff *v.* Thompson, 10 Penn. St., 57.

VII. Other Notice Considered in Connection with Registration.

§ 231. Actual Notice of Unregistered Deed.
232. Purchaser Protected by Good Faith of Execution Creditor.
233. Equitable Interference in Favor of Holder of Unrecorded Title.
234. Creditor's Interest Held to Attach from Date of Levy.
235. Unregistered Deeds Good Against Creditors With Notice.
236. Notice of Deed Must be Subsequent to Its Execution.
237. Notice of Assignment Governed by Same Principle.
238. Judgments Given Precedence Over Prior Deeds.
239. Deed Takes Priority if Registered Before Execution Sale.
240. Judgments Do Not Become Liens After Conveyance and Before Registry.
241. Title Not Affected by Recording Deed After Title Vests in Innocent Purchaser.
242. Reasons for the Above Doctrine.
243. Effect of Re-purchase by Fraudulent Grantor.
244. Conflicting Decisions as to Sufficient Notice of Unregistered Deed.
245. Express Notice Required.
246. Actual or Constructive.
247. Different Kinds of Notice Referred to.
248. Cases Holding Notice Ineffectual Against the Record.
249. Cases Holding Implied Notice Sufficient.
250. Illustration of Implied Notice.
251. Any Kind of Notice Will Affect Purchasers.
252. Putting Upon Inquiry Held Insufficient.
253. Knowledge of Mortgage Withheld from Record.
254. Record of Instrument Affecting Equitable Interest.
255. Effect of Withdrawing Deed from Files Before Recording.
256. Priority Secured by Registration.
257. Fraud Practiced by Agent.
258. Vague Information Disregarded.
259. Subsequent Purchase Not Invalidated by Notice of Prior Deed.
260. Same — Doubtful Authority.
261. Record Chain of Title Incomplete.
262. Assignee of a Mortgage Regarded as Purchaser.
263. Time of Notice.
264. Same, to Attaching Creditor.
265. When Notice Too Late.
266. After Purchase at Execution Sale.
267. Before Legal Title is Conveyed.
268. Time of Filing for Record Fixed by Statute.

§ 269. Recording After Death of Grantor.
270. Examining Records Insufficient Inquiry.
271. Unrecorded Chattel Mortgage.
272. Description of Debt in Mortgage.

§ 231. Actual Notice of Unregistered Deed.— Actual notice of an unregistered deed will be as effectual as the formal registration of the instrument.[1] But this actual notice must be brought home to the party to be affected by it. The fact that one of two partners, judgment creditors, had seen a deed from the debtor, who had been allowed to remain in possession of the premises for two years, and the deed had remained unrecorded for that time, was not deemed such notice, or evidence of notice, as would entitle the grantee in the prior unregistered deed to relief.[2]

§ 231a. The Extent to Which Actual Notice Affects Subsequent Purchasers.— Where one purchases land previously conveyed by his grantor, he cannot occupy the position of a purchaser in good faith, unless he is without notice of the prior conveyance. If the prior deed is registered, he has constructive notice, by which he and all purchasers under him are bound. But even where it is unregistered, and the subsequent vendee pays full value for the property, if he is otherwise notified of the prior conveyance, he takes no title, except where, under the peculiar provisions of the controlling statute, no kind of notice, in the absence of registration, will be effectual.[3] Although he

[1] Tuttle *v.* Jackson, 6 Wend., 213; Greaves *v.* Tofield, L. R., 14 Ch. Div., 563; Ford *v.* White, 16 Beav., 120; Benham *v.* Keane, 3 De G., F. & J., 318; Chadwick *v.* Turner, L. R., 1 Ch., 310; Credland *v.* Potter, L. R., 10 Ch., 8; Doe *v.* Allsop, 5 B. & Add., 142; Wallis *v.* Rhea, 10 Ala., 451; Jordan *v.* Mead, 12 Ala., 247; Wyatt *v.* Stewart, 34 Ala., 716; Dearing *v.* Watkins, 10 Ala., 20; Boyd *v.* Beck, 29 Ala., 703; Chew *v.* Barnet, 11 S. & R., 389; Green *v.* Drinker, 7 Watts & S., 440; Harris *v.* Bell, 10 S. & R., 39. See *ante*, ch. I, part I; Bowman *v.* Lee, 48 Mo., 335; The "John T. Moore," 4 Am. Law T., 406.

[2] Farnsworth *v.* Childs, 4 Mass., 637. See Ingram *v.* Phillipps, 3 Strobhart, 565.

[3] Mahoney *v.* Middleton, 41 Cal., 41; Davis *v.* Earl of Strathmore, 16 Ves., 419; Le Neve *v.* Neve, White & Tud. Lead. Cas. in Eq. (4th Am. ed.), 109; Britton's Appeal, 45 Pa. St., 172. But see, as to the effect of a

pays value for the property, and is beforehand with the prior grantee in getting his instrument recorded, he will hold the title subject to the superior rights of the prior purchaser. There is but one advantage he can gain by recording his conveyance in advance of the others, and that is to be able to pass a good title to one purchasing without notice of the former conveyance. And even such innocent purchaser, in order to obtain the benefit of his position as such, must file his conveyance for record in advance of the filing of that of the first grantee.[1]

§ 232. **Purchasers Protected by Good Faith of Execution Creditor.**— However, in the case of Low *v.* Blinco,[2] it is laid down as a rule, deduced from the authorities cited below, that a purchaser at an execution sale, with notice of an outstanding unregistered title, is protected, provided the creditor acts in good faith without notice. The creditor having the right to direct the sale, the purchaser takes all the title the sheriff can be required to sell.[3]

§ 233. **Equitable Interference in Favor of Holder of Unrecorded Title.**— Courts of equity do not always regard purchasers at execution sales as purchasers for value. And have refused to allow a judgment creditor to subject land of his debtor to his judgment in equity after such land had been sold to another, though not yet conveyed, even where the creditor had no notice of such sale, either actual or constructive.[4]

peculiar statute, White *v.* Denman, 1 Ohio St., 110; Bloom *v.* Noggle, 4 Ohio St., 45; Holliday *v.* Franklin Bank, 16 Ohio, 533; Stansell *v.* Roberts, 13 Ohio, 148; Jackson *v.* Luce, 14 Ohio, 514; Mayham *v.* Coombs, 14 Ohio, 428; Robinson *v.* Willoughby, 70 N. C., 358; Leggett *v.* Bullock, Busb. L., 283; Baker *v.* Woodward, 5 West Coast Rep., 136.

[1] Mahoney *v.* Middleton, 41 Cal., 41; Fallass *v.* Pierce, 30 Wis., 443; Ring *v.* Steele, 3 Keyes, 450; Goelet *v.* McManus, 1 Hun, 306; Sims *v.* Hammond, 33 Iowa, 368. But see Glidden *v.* Hunt, 24 Pick., 221; Connecticut *v.* Bradish, 14 Mass., 296.

[2] 10 Bush (Ky.), 331.

[3] Morton *v.* Robards, 4 Dana (Ky.), 258; Halley *v.* Oldham, 5 B. Monr., 233; Righter *v.* Forrester, 1 Bush, 278.

[4] Kelly *v.* Mills, 41 Miss., 267.

§ 234. Creditor's Interest Held to Attach from Date of Levy.— Under a statute making the record of written instruments notice to subsequent purchasers and creditors from the date of filing for record, it was held that where a levy, subsequent to the date of the deed, but before the same was filed for record, a purchaser at the sale under such levy would be protected in his purchase, against the grantee, whose deed was not recorded until after the levy, provided the creditor had no notice of the deed at the time he directed the levy.[1]

§ 235. Unregistered Deeds Good Against Creditors With Notice.— Unregistered deeds are good as against creditors with sufficient notice to put them upon inquiry. And possession by the grantee has been held sufficient notice to creditors, as well as subsequent purchasers and mortgagees.[2]

§ 236. Notice of Deed Must be Subsequent to Its Execution.— The notice to creditors should be subsequent to the execution of the instrument. So, where one of two creditors of an insolvent debtor, anticipating the execution of a deed to the other creditors by way of a preference, and in fact having positive knowledge that such deed was in course of preparation, sued out a writ of attachment before the deed was delivered, and had the same levied upon the debtor's land before the deed had been deposited for record, but not before the completion of the conveyance, it was held that the title derived under the execution of the attachment would prevail over that under the deed.[3]

§ 237. Notice of Assignment Governed by Same Principle.— So, also, in a contest between two creditors of a mortgagee, where one of them obtained an assignment of the security while an assignment to the other was being drawn, and made haste to have it first recorded, his diligence in taking advantage of the compliant disposition of the debtor, and the deliberate movements of the other creditor,

[1] Reichert *v.* McClure, 23 Ill., 516.

[2] Dixon *v.* Doe, 1 Sm. & Marsh., 70; Priest *v.* Rice, 1 Pick., 164.

[3] Cushing *v.* Hurd, 4 Pick., 252.

gave him the better title to the mortgage. He was not informed of the assignment to the other, after it was made, and could not be charged with notice of a fact by information received before the fact was accomplished. The mere circumstance that he knew of his rival's intention to obtain an assignment of the security could give that rival no superior equity; so that his vigilance in being beforehand with the other creditor, and getting his instrument first of record, was sufficient to give him the paramount right.[1]

§ 238. **Judgments Given Precedence Over Prior Deeds.**— In some instances, the courts, under the peculiar wording of the recording acts of their states, or influenced and controlled by earlier decisions of the same courts, have held that a creditor would not be affected by the registration of a prior deed, subsequent to the obtaining of a judgment,[2] or even the contraction of the debt for which the judgment is rendered.[3]

§ 239. **Deed Takes Priority if Registered Before Execution Sale.**— The better opinion seems to be, however, under statutes rendering unrecorded deeds void, as against subsequent purchasers and mortgagees, without notice, and for a valuable consideration, and where judgments become liens upon the real estate of the debtor from their rendition, that where a deed or mortgage has been executed and delivered prior to the date of the judgment, the purchaser or mortgagee will be entitled to the protection of the registry laws if his deed or mortgage is filed for record before the sale under execution.[4]

§ 240. **Judgments Do Not Become Liens After Conveyance and Before Registry.**— So, where purchasers and mortgagees were allowed ninety days within which to deposit

[1] Wardin *v.* Adams, 15 Mass., 233.

[2] Hulings *v.* Guthrie, 4 Penn. St., 123; Taylor *v.* Doe, 13 How. (U. S.), 287.

[3] See Britton's Appeal, 45 Penn. St., 172.

[4] Greenleaf *v.* Edes, 2 Minn., 264; Davis *v.* Ownsby, 14 Mo., 170; Valentine *v.* Havener, 20 id., 133; Mann *v.* Best, 62 Mo., 491, and cases cited.

their deeds and mortgages for record, and a purchaser allowed the time to pass without recording his deed, before he had deposited it for record, judgment was obtained against the former owners, and one A. became "replevin bail" upon the faith of representations by the judgment debtor that the land was unincumbered, except by the lien of the judgment. In an action by the replevin bail for the purpose of securing indemnity through the means of the judgment, for his collateral undertaking, it was held that the judgment was no lien upon the land, for the reason that the debtor had no title to the land at the time it was rendered, and the replevin bail could occupy no better position with respect to the judgment than the creditor himself would have enjoyed.[1]

§ 241. Title Not Affected by Recording Deed After Title Vests in Innocent Purchaser.— The title having once passed through the hands of a purchaser for value, and without notice of a prior unregistered deed, it will pass to subsequent grantees, unaffected by the prior conveyance, whether subsequently recorded or not. So, where one who purchased with notice, and before the registration of the prior deed, conveys to another, who has no actual or constructive notice of such instrument, the title of his grantee is good against the former unregistered conveyance. Should this last grantee convey to still another who had both actual and constructive notice of the prior deed, his title would be good in spite of the outstanding conveyance.[2]

[1] Under some of the English statutes judgments do not become liens on real estate as against subsequent *bona fide* purchasers, unless they are duly registered. Beavan *v.* Earl of Oxford, 6 De G., M. & G., 492; Eyre *v.* McDowell, 9 H. L. Cas., 619; Hickson *v.* Callis, 1 Jones & L., 94. See Freer *v.* Hesse, 4 De G., M. & G., 495; Governors of the Grey Coat Hospital *v.* Westminster, etc., Comm'rs, 1 De G. & J., 531; Knight *v.* Pocock, 24 Beav., 436; Churchill *v.* Grove, 1 Ch. Cas., 35; Lee *v.* Green, 6 De G., M. & G., 155; Davis *v.* Strathmore, 16 Ves., 419; Proctor *v.* Cooper, 2 Drew, 1; 1 Jur., N. S., 149; Runyan *v.* McClellan, 24 Ind., 165.

[2] Trull *v.* Bigelow, 16 Mass., 406; Somes *v.* Brewer, 2 Pick., 184.

§ 242. Reasons for the Above Doctrine.— It would be but a doubtful protection to a *bona fide* purchaser if his reliance upon the record only gave him a title to the property purchased, which the law rendered inalienable except to those who might be as ignorant of the adverse claim as he was himself before the purchase. The law having declared that the deed was void as to him, meant that the title which he obtained should be as absolute and unburthened by the unregistered deed, or those claiming under it, as though no such instrument was ever executed. The title cannot be wrested from him by the negligent grantee, nor will the law allow the value of the property to be diminished in his hands by depriving him of the benefits of a free market.[1]

§ 243. Effect of Re-purchase by Fraudulent Grantor.— But should the premises come again to the hands of the fraudulent grantor, they will be held by him in trust for the first grantee. It being deemed a wrong of less magnitude to deprive the innocent purchaser of this one opportunity to sell than it would be to suffer the perpetrator of such a fraudulent act to enjoy any advantage over his victim.[2]

§ 244. Conflicting Decisions as to Sufficient Notice of Unregistered Deed.— There is a marked contrariety in the authorities as to what is sufficient notice of an unregistered deed. This difference, in some instances, is owing to the different statutory provisions of those states where the question has been adjudicated. In other instances there are conflicting decisions as to the proper construction of similar or even identical statutes, by which decisions the law is regarded as settled within the jurisdiction of the courts by which they are rendered.[3]

[1] *Ante*, §§ 61, 62.

[2] *Ante*, § 63.

[3] Dey *v.* Dunham, 2 Johns. Ch., 182; Dunham *v.* Dey, 15 Johns., 555; Norcross *v.* Widgery, 2 Mass., 505; McMechan *v.* Griffing, 3 Pick., 149; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch., 381; Gen'l Ins. Co. *v.* U. S. Ins. Co., 10 Md., 517; Fleming *v.* Burgin, 2 Ired. Eq., 584; Noyes *v.* Hall, 97 U. S., 34; Brinkman *v.* Jones, 44 Wis., 498; White *v.* Foster, 102 Mass.,

§ 245. **Express Notice Required.**— In some of the cases it has been decided that nothing short of express notice of the prior unregistered deed will suffice to charge the subsequent purchaser, and protect the title of the prior grantee. The information by which the subsequent grantee or mortgagee is advised of the existence of the prior unregistered instrument, to be effective, must be so direct and positive that to disregard it would amount to fraud on his part.[1]

§ 246. **Actual or Constructive.**— Others hold that the notice may be either actual or constructive, express or implied. And where actual notice is required by statute, they vary in their construction of the law as to the evidence by which such notice may be established. These latter, in furtherance of the liberal construction given for the benefit of the grantee whose deed is unrecorded, hold that any fact coming to the knowledge of the subsequent purchaser, sufficient to put a man of ordinary prudence upon inquiry, and which, if followed out, would lead to express notice of the unregistered conveyance or claim, is sufficient to invalidate the subsequent deed, notwithstanding the provisions of the registry laws. Notice is imputed to him on account of his negligence in not prosecuting his inquiries in the direction indicated.[2]

375; Lamb *v.* Pierce, 113 Mass., 72; Crassen *v.* Swoveland, 22 Ind., 427; Wilson *v.* Hunter, 30 id., 466; Lawton *v.* Gordon, 37 Cal., 202; Maupin *v.* Emmons, 47 Mo., 304.

[1] Pomroy *v.* Stevens, 11 Metc. (Mass.), 244; Spofford *v.* Weston, 29 Me., 140; Porter *v.* Sevy, 43 id., 519; Dooley *v.* Wolcott, 4 Allen, 406; Lilliard *v.* Ruckers, 9 Yerg., 64; Dewey *v.* Littlejohn, 2 Ired. Eq., 495; Mayham *v.* Coombs, 14 Ohio, 428; Hine *v.* Dodd, 2 Atk., 275; Jackson *v.* Van Valkenburgh, 8 Cow., 260; Jolland *v.* Stainbridge, 3 Ves. Jr., 478.

[2] Dunham *v.* Dey, 15 Johns., 555; Brinkman *v.* Jones, 44 Wis., 498; Noyes *v.* Hall, 97 U. S., 34; Wilson *v.* Hunter, 30 Ind., 466; Crassen *v.* Swoveland, 22 Ind., 427; Truesdale *v.* Ford, 37 Ill., 210; Cabeen *v.* Breckenridge, 48 Ill., 91; Porter *v.* Cole, 4 Me., 20; Whitbread *v.* Jordan, 1 Young & Colyer, 303; Williamson *v.* Brown, 15 N. Y., 354; Krider *v.* Lafferty, 1 Whart., 303; Hankinson *v.* Barbour, 29 Ill., 80; Hopkins *v.* Gerrard, 7 B. Monr., 312; Curtis *v.* Mundy, 3 Metc. (Mass.), 405; Clark *v.* Trindle, 52 Pa. St., 492; Dixon *v.* Doe, 1 Sm. & Marsh., 70; Tay-

§ 247. Different Kinds of Notice Referred to.— As to the effect of the doctrine of *lis pendens*, and notice arising from recitals in the conveyances forming the chain of title of the purchaser, and also as to notice by possession, the reader is referred to the subsequent chapters where these topics are separately treated, and more fully illustrated by reference to adjudged cases, classified under their respective heads.[1]

§ 248. Cases Holding Notice Ineffectual Against the Record.— Some of the cases cited in support of the strictest construction of the statute, as Lilliard *v.* Ruckers, and Dewey *v.* Littlejohns, take the extreme position that personal notice of an unregistered deed will not affect the subsequent purchaser who relies upon the record. So, in the case of Mayham *v.* Coombs,[2] which was decided under a statute rendering unregistered mortgages absolutely void as to the subsequent purchases or incumbrances, the court gave the statute such a construction as would render notice by any other means ineffectual.

§ 249. Cases Holding Implied Notice Sufficient.— The cases of Williamson *v.* Brown,[3] Whitbread *v.* Jordan,[4] and most of the others cited in support of the more liberal construction, go upon the ground that even actual notice is a fact to be established by evidence, and may be proved otherwise than by evidence of direct personal information. They also hold, for the most part, that voluntary ignorance on the part of the purchaser is the legal and logical equivalent of actual knowledge.

§ 250. Illustration of Implied Notice.— Musgrove *v.* Bonser[5] was a case where the deed had been copied upon

lor *v.* Lowenstein, 50 Miss., 278; Edwards *v.* Thompson, 71 N. C., 177; Musgrove *v.* Bonser, 5 Oregon, 313; Nute *v.* Nute, 41 N. H., 60; Galland *v.* Jackman, 26 Cal., 79. See Wormald *v.* Maitland, 35 L. J. Ch. (N. S.), 69; *In re* Allen, 1 Ir. R. Eq., 455.

[1] See *post*, chs. IV, V, VI.

[2] 14 Ohio, 428.

[3] 15 N. Y., 354.

[4] 1 Y. & Col., 303.

[5] 5 Oreg., 313.

the records, but because it was improperly acknowledged before recording, the record was held a nullity as constructive notice. But the attorney who was employed by the subsequent purchaser to search the record for instruments affecting the title, saw the defective record of the deed in question, and informed the purchaser that it had no right on record. Upon the ground that notice to the agent was notice to the principal, the court held that the actual knowledge the attorney had of the defectively acknowledged deed was sufficient to have put a man of ordinary prudence upon such inquiry as must have inevitably led to the knowledge of the unrecorded deed, and that it was therefore binding upon the purchaser's conscience.[1]

§ 251. **Any Kind of Notice Will Affect Purchaser.**— From a careful consideration of the authorities, old and new, English and American, it seems that the better doctrine is now, except where the statute is imperative in its provisions to the contrary, that any species of notice, by which one seeking to purchase real estate is informed of or cautioned in regard to any unregistered instrument affecting the title to the property, or any equitable interest claimed by any one, will as effectually bind such property in the hands of such purchaser as it would in the hands of the fraudulent grantor.[2]

§ 252. **Putting Upon Inquiry Held Insufficient.**— The case of Jackson *v.* Van Valkenburg[3] is one of those in which it is declared that notice of an antecedent unregistered mortgage upon the leasehold, to the assignee for value of a subsequent mortgage upon the fee of the same premises, in order to affect his rights under the assignment, must be such as would with the attendant circumstances be sufficient to fix upon him the imputation of a fraudulent purpose in accepting the assignment. It was held that putting the party

[1] See Barnes *v.* McClinton, 3 Penn., 67.

[2] Porter *v.* Cole, 4 Me., 20. See *ante*, ch. I, Actual Notice.

[3] 8 Cow., 260.

upon inquiry was not sufficient. The circumstances of this particular case were such that it may well be doubted whether such notice as the assignee had was sufficient to put him upon inquiry respecting a mortgage, as what he learned was from the record of an absolute assignment of the lease, without the defeasance which should have been recorded with it.[1]

§ 253. **Knowledge of Mortgage Withheld from Record.**—Where a mortgage is designedly withheld from registration, in order to preserve the credit of the mortgagor in the commercial world, such conduct on the part of the mortgagee is not fraudulent as to one having knowledge of the entire transaction, as he is not deceived by it. And whatever might be the rights of a party who purchased in ignorance of the facts, the one who seeks to take advantage of an unregistered instrument, of the existence of which he has been fully informed, will be allowed to enjoy no special advantages from the fact that the failure to record the mortgage was fraudulent as to others.[2]

§ 254. **Record of Instrument Affecting Equitable Interest.**—The record of an assignment or mortgage of an equitable interest in real estate will operate as notice to subsequent purchasers or mortgagees, as effectually as though the legal title were conveyed or incumbered; as where one purchases land for which he receives a title-bond instead of a deed, conditioned that the legal title shall be conveyed to him when the land is paid for, which bond is duly recorded; and, before paying for the land, the purchaser mortgages his interest, and subsequently the mortgagor, in order to meet the demands of his grantor, executes a mortgage to still another party, and with the proceeds pays for the land and receives a deed. In such case the release from the vendor's lien inures to the benefit of the first mortgagee, and the second mortgagee, by the record of the title-bond

[1] See *ante*, § 186 *et seq.*

[2] Pike *v.* Armstead, 1 Dev. Eq., 110.

and the first mortgage, is charged with notice of the rights thereby secured.[1]

§ 255. **Effect of Withdrawing Deed from Files Before Recording.**— But when, as in the case of Clamorgan *v.* Lane,[2] the grantee placed his deed on record on the 26th day of the month, and a subsequent purchaser received a deed to the same premises from the same grantor on the 27th, which he placed on record in the forenoon, and the first grantee withdrew his deed from the files to be canceled, and accepted another deed, which he deposited for record in the afternoon of the 27th, it was held that the record of the first deed was no notice of the one given in lieu thereof, and that the prior purchaser could not claim priority of record after withdrawing the first deed from the files.[3]

§ 256. **Priority Secured by Registration.**— Under statutes which prescribe no time within which the instrument may be recorded, the courts have generally regarded the first recorded of two instruments affecting the title to the same land, as the one entitled to precedence. As where a grantor took a mortgage for a portion of the purchase price, and intrusted it to the mortgagor with directions to have it recorded, but before depositing it for record the mortgagor entered into a written contract with another party, who had no notice of the mortgage, to convey the land to him; the mortgage being recorded prior to the recording of the contract, and before the latter was either carried out or brought to the knowledge of the mortgagee, it was held that he might subject the land to the payment of his debt as though the contract had not been made.[4]

§ 257. **Fraud Practiced by Agent.**— It has been held, where there was a similar statute to the one under which the case cited above was decided, where the claim for prece-

[1] Alderson *v.* Ames, 6 Md., 52; Clamorgan *v.* Lane, 9 Mo., 446; Gen'l Ins. Co. *v.* U. S. Ins. Co., 10 Md., 517; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch., 381.

[2] 9 Mo., 446.

[3] Kiser *v.* Heuston, 38 Ill., 252.

[4] Anketel *v.* Converse, 17 Ohio St., 11.

dence was being contested in a court of equity, that the court would determine the relative rights of the parties on equitable principles.[1] It is difficult to understand how a court of equity could tolerate such a palpable fraud as was apparently perpetrated upon the innocent contracting party in the Ohio case. The mortgagee, by intrusting his security to the mortgagor, not only made him his agent, but did so with the knowledge that he, of all others, was most interested in violating his trust, and by so doing enabled him to practice a fraud upon others.

§ 258. **Vague Information Disregarded.**— The case of Jolland *v.* Stainbridge,[2] which has been cited as one in which express notice is required in order to deprive a subsequent purchaser or mortgagee of the protection of the registry laws, was a contest between one claiming under an unregistered will, and a subsequent mortgagee. The evidence of notice was that the mortgagee was told, while negotiations were pending, that the person offering the premises had no right to sell the same. Also the evidence of the mortgagee's bookkeeper, that the wife of mortgagee told the witness, in the presence and hearing of her husband, prior to the mortgage, that the devisee's mother had told the mortgagee not to purchase, as the estate belonged to her daughter. Still the court held that the evidence of notice was not such as would show conduct on the part of the mortgagee amounting to actual fraud, and gave the preference to the subsequent registered mortgage.

§ 259. **Subsequent Purchase Not Invalidated by Notice of Prior Deed.**— Notice will not always invalidate a subsequent purchase, even when it is so direct and positive as to be equivalent to actual knowledge. Circumstances may arise where a purchase, subsequent to an unregistered conveyance, may be made in such good faith that it will be protected, even though the purchaser has undeniable knowledge of the prior deed. As where he is informed by the

[1] Swigert *v.* Bank of Kentucky, 17 B. Monr., 268.
[2] 3 Ves. Jr., 478.

prior grantee himself that the deed is withheld from the record because he does not intend to assert any title under it, and that it was never intended to operate as an actual conveyance of the land, and the second purchase is made in reliance upon these representations.

§ 260. **Same — Doubtful Authority.**— A court of equity has even declared the doubtful doctrine that a subsequent purchaser would be protected, when he acted in good faith, after notice of the prior unregistered deed, because he had been informed of the intention of such grantee not to record his deed or assert his title, where it did not appear that the information came from the grantee himself.[1]

§ 261. **Record Chain of Title Incomplete.**— The purchaser may be served with constructive notice by registration, even when the complete chain of title does not appear of record. The connection between the title or interest with notice of which he is charged by the record, and that upon which it depends, may be independent of the record. As, where the provision of the statute was, that every instrument affecting the title of real estate from the time of filing with the register of deeds for record "shall impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice," it was held that one purchasing with notice of an outstanding unregistered equitable interest in land was chargeable with notice of an incumbrance of such interest which had been filed for record, though he may have purchased without actual notice of such mortgage.[2]

§ 262. **Assignee of a Mortgage Regarded as Purchaser.**— The assignee of a mortgage will be protected to the same extent as any other innocent purchaser.[3] As,

[1] Fleming *v.* Burgin, 2 Iredell, Eq., 584. Where the subsequent purchaser receives no notice until after consideration paid, notice will not prevent him from perfecting his right by filing his deed for registration. Essex *v.* Baugh, 1 Y. & C. Ch., 620; Elsey *v.* Lutyens, 8 Hare, 159.

[2] Jones *v.* Lapham, 15 Kans., 540.

[3] But the purchaser of a mortgage will have constructive notice from the record, of a mortgage of even date, though recorded subsequent to

where a mortgage was given to secure a debt, subsequent to a deed conveying the same premises to another, but the deed was not recorded until after the mortgage had been assigned to a *bona fide* purchaser for value, and the mortgagee took the mortgage without notice of the unregistered deed, it was held that the assignee was not affected by the subsequent registration of the deed, but would still be entitled to subject the land to the payment of his demand.[1]

§ 263. **Time of Notice.**— The time when the notice is imparted to a subsequent purchaser is often material in determining whether or not his purchase will be affected thereby. The notice, in order to affect his conscience, may have been given too long before his acquisition of title to render it probable that the fact of the prior conveyance was present to his mind when he made the purchase.[2]

§ 264. **Same, to Attaching Creditor.**— But where land was attached at the suit of a creditor, as the land of his debtor, when he had been informed by the grantee, two years prior to the attachment, that he had purchased the land from the debtor, it was held that though the deed to the purchaser was still unrecorded at the time of the attachment, the notice was sufficient, and the purchaser's title would be protected as against the attaching creditor.[3]

§ 265. **When Notice Too Late.**— The notice may also be too late to be effectual against those who subsequently acquire title to the premises, or an equitable interest therein. On this point there has been no little contrariety of opinion expressed by the courts, at different times,— partly owing to difference in the statutes, but in some instances the decisions are at variance where the statutes construed are substantially the same. However, it will be found to be

the one purchased, if such purchase was subsequent to the recording of the other instrument. Van Aken *v.* Gleason, 34 Mich., 477.

[1] Mott *v.* Clark, 9 Pa. St., 399.

[2] Boggs *v.* Varner, 6 W. & S., 469; Fuller *v.* Bennett, 2 Hare, 394; Worsley *v.* Earl of Scarborough, 3 Atk., 392.

[3] Ogden *v.* Haven, 24 Ill., 57; Cox *v.* Milner, 23 id., 476.

almost uniformly held that the notice is too late if it comes to the purchaser only after he has completed the purchase and paid the consideration.[1]

§ 266. **After Purchase at Execution Sale.**— It has been maintained, however, that a purchaser at an execution sale directed by the creditor in good faith, after having made the purchase is entitled to his deed, even though he receives notice of a prior unregistered deed previous to his payment of the purchase money. And it is further held that his rights will not be affected, either by the fact that he, being a stranger to the execution, had notice of the prior deed, or that he is himself the execution creditor, provided he had no notice before the sale. But should the knowledge of the adverse interest come to him in the way of an announcement at the time of the sale, and before it is closed, the title acquired by the purchase will be subordinate to that of the prior grantee.[2]

§ 267. **Before Legal Title is Conveyed.**— Upon the other hand, it has been held by the same court in which the above doctrine was announced, that a purchaser of land takes subject to prior equities of which he has notice, although the contract is completed, and even the purchase money paid, before notice is given of the antecedent claim, provided he is notified before his own equity is clothed with the legal title; and creditors to whom the title is transferred by operation of law occupy no better position than any other subsequent purchaser.[3]

§ 268. **Time of Filing for Record Fixed by Statute.**— In those states where a certain period of time is fixed by statute within which the instrument is required to be lodged with the officer for registration, the failure to deposit it for record within the time prescribed does not always, as we have seen,[4] operate to invalidate the record. It is, in gen-

[1] Henry *v.* Raiman, 25 Penn. St., 354. See, also, *ante*, § 93.

[2] Low *v.* Blinco, 10 Bush (Ky.), 331; Morton *v.* Robards, 4 Dana, 258; Halley *v.* Oldham, 5 B. Monr., 233; Righter *v.* Forrester, 1 Bush, 278.

[3] Corn *v.* Sims, 3 Met. (Ky.), 391.

[4] *Supra*, §§ 102, 225.

eral, good for all the purposes for which it was originally designed, from the date of its filing for record, whenever that is after the time prescribed.[1] But it has been decided that a voluntary deed, to be effectual as against creditors of the grantor without notice, should be recorded within three months of the delivery of the deed, where that was the statutory time fixed.[2] The statute was construed with the same strictness in favor of a subsequent mortgage given to secure the debt of the husband, where the prior voluntary deed was from the husband to the wife.[3]

§ 269. **Recording After Death of Grantor.**— It has also been held that the registration of a deed after the death of the grantor was not good as against creditors of the grantor, who had no notice of such conveyance;[4] but the application of this rule would be controlled in a great measure by statutory provisions as well as by the peculiar circumstances of any case in which it might be invoked.

§ 270. **Examining Records Insufficient Inquiry.**— A purchaser who, previous to the purchase, is informed of a prior unregistered deed to the same premises, and who searches the records without finding any entry of the prior deed, will not be protected as a purchaser in good faith merely because he examined the records after receiving information of the prior deed. He should have made personal inquiry from those most likely to possess knowledge of the conveyance, and, from the character of the discoveries made in the course of such inquiry, been warranted in believing that no such deed had ever been executed and delivered.[5]

§ 271. **Unrecorded Chattel Mortgage.**— Under a statute which rendered a mortgage of chattels void, except as against the mortgagor and his heirs, unless recorded, it was

[1] *Supra*, §§ 102, 225.

[2] Fulcher *v.* Royal, 55 Ga., 68.

[3] Sumner *v.* Bryan, 54 Ga., 613.

[4] Lank *v.* Hiles, 4 Houst. (Del.), 87.

[5] Shotwell *v.* Harrison, 30 Mich., 179; *ante*, § 11, and cases cited in note.

held that such a mortgage was good against an attaching creditor with notice. And also that notice to the officer levying the attachment was notice to the creditor by whom the attachment was directed.[1]

§ 272. **Description of Debt in Mortgage.**— In some cases considerable strictness has been required in mortgages, to render their registration effectual, in the description, not only of the property incumbered, but of the debt thereby secured. In general, however, more recent decisions have favored such modifications of the rules in regard to specification of the amount of debt, and the nature of the evidences thereof, that mortgages to secure future advances are permitted when the amount to be secured is necessarily uncertain.[2]

[1] Tucker *v.* Tilton, 55 N. H., 223.

[2] Witczinski *v.* Everman, 51 Miss., 841. See, also, United States *v.* Hooe, 3 Cranch, 73; Shirras *v.* Caig, 7 Cranch, 34; Leeds *v.* Cameron, 3 Sumn., 488; Commercial Bank *v.* Cunningham, 24 Pick., 270; Goddard *v.* Sawyer, 9 Allen, 78; James *v.* Morey, 2 Cow., 246, 292. It is held in the latter case, however, that the record of an *assignment* of a mortgage will not be notice to subsequent purchasers, because it is not required to be registered. It is laid down in Jones on Mortgages (§ 365), as the English rule with respect to notice, as it affects mortgagees for future advances, that notice to such a mortgagee of a subsequent incumbrance will render any advances made thereafter subservient to the lien of the second mortgagee. But such does not seem to be the rule in this country. Jones on Mortgages, §§ 365, 366, 367, and cases cited.

CHAPTER IV.

NOTICE BY POSSESSION.

§ 273. General Doctrine.
274. Modified by Registry Laws.
275. Evidence of Actual Notice.
276. Sufficient to Put Purchaser Upon Inquiry.
277. Same.
278. Effect of Knowledge of Possession.
279. Voluntary Ignorance.
280. Character of Possession.
281. Possession by Tenant.
282. Notice of Interest Claimed by Occupant.
283. Notice of Interest of Occupant's Creditors.
284. Tenant's Occupancy, Notice of Landlord's Title.
285. Same.
286. Consistency of Foregoing Doctrine.
287. Possession No Evidence of Title in Stranger.
288. Must be Actual, Notorious and Continuous.
289. Occupancy by Church Society.
290. Exclusive.
291. Unequivocal.
292. Doubtful in Extent.
293. Same.
294. Possession and Right Claimed Contemporaneous.
295. Instance of Exception to the Rule.
296. Effect of Abandoning Possession.
297. Possession Referred to Record Title.
298. Same.
299. Claim Consistent with Record Title.
300. Notice of Reservation of Easement.
301. Exception to Rule Requiring Consistency.
302. Possession to Begin with Unrecorded Title.
303. Possession as Lessee Changed to Possession as Owner.
304. The Rule in Mississippi.
305. Creditors Affected with Notice.
306. Possession of Chattels.

§ 273. General Doctrine.— The doctrine seems quite firmly established, by successive judicial decisions, both in

this country and in England, that open, notorious and exclusive possession of real estate, under an apparent claim of ownership, is notice to those who subsequently deal with the title, of whatever interest the one in possession has in the fee; whether such interest be legal or equitable in its nature.[1] In general, the possession upon which such claimants rely as notice to purchasers is held under and pursuant to an unrecorded deed, or a contract of purchase, which if in writing is unrecorded, and if merely a parol agreement, depends upon its partial execution, to entitle the covenantee to specific performance.

[1] Story *v.* Black (Mont.), 1 Pac. Rep., 1; Landes *v.* Brant, 10 How., 348; McKenzie *v.* Perril, 15 Ohio St., 168; Jones *v.* Marks, 47 Cal., 242; Ray *v.* Birdseye, 5 Den., 626; Cabeen *v.* Breckenridge, 48 Ill., 91; School Dist. *v.* Taylor, 19 Kans., 287; Johnson *v.* Clark, 18 Kans., 157; Tankard *v.* Tankard, 79 N. C., 54; Edwards *v.* Thompson, 71 N. C., 177; Noyes *v.* Hall, 97 U. S., 34; Truesdale *v.* Ford, 37 Ill., 210; Dunlap *v.* Wilson, 32 Ill., 517; Reeves *v.* Ayres, 38 Ill., 418; Keys *v.* Test, 33 Ill., 316; Brown *v.* Gaffney, 28 Ill., 149; Bradley *v.* Snyder, 14 Ill., 263; Ill. C. R. Co. *v.* McCullough, 59 Ill., 166; Tunison *v.* Chamblin, 88 Ill., 378; Pell *v.* McElroy, 36 Cal., 268; Bogue *v.* Williams, 48 Ill., 371; Strickland *v.* Kirk, 51 Miss., 795; Loughridge *v.* Bowland, 52 Miss., 546; Moss *v.* Atkinson, 44 Cal., 3; Killey *v.* Wilson, 33 Cal., 690; Sears *v.* Munson, 23 Ia., 380; Phillips *v.* Costley, 40 Ala., 486; Perkins *v.* Swank, 43 Miss., 349; Glidwell *v.* Spaugh, 26 Ind., 319; Warren *v.* Richmond, 53 Ill., 52; Bank of Orleans *v.* Flagg, 3 Barb. Ch., 316; Baldwin *v.* Johnson, Saxt. Ch., 441; Baynard *v.* Norris, 5 Gill, 468; Ringold *v.* Bryan, 3 Md. Ch. Dec., 488; Taylor *v.* Kelly, 3 Jones, Eq., 240; Doyle *v.* Stevens, 4 Mich., 87; Emmons *v.* Murray, 16 N. H., 385; Mullins *v.* Wimberley, 50 Tex., 457; McLaughlin *v.* Shepherd, 32 Me., 143; Hardy *v.* Summers, 10 Gill & J., 316; Wickes *v.* Lake, 25 Wis., 71; McCulloch *v.* Cowher, 5 Watts & Serg., 427; Woods *v.* Farmere, 7 Watts, 385; Bailey *v.* White, 13 Tex., 114; Davies *v.* Hopkins, 15 Ill., 519; Lea *v.* Polk County Copper Company, 21 How., 493; Hughes *v.* United States, 4 Wall., 232; Shumate *v.* Reavis, 49 Mo., 333; Chesterman *v.* Gardner, 5 Johns. Ch., 29; Tuttle *v.* Jackson, 6 Wend., 213; Morton *v.* Robards, 4 Dana, 258; Macon *v.* Sheppard, 2 Humph., 335; Burt *v.* Cassety, 12 Ala., 734; Dixon *v.* Doe, 1 Sm. & Marsh., 70; Johnston *v.* Glancy, 4 Blackf., 94; Harris *v.* Arnold, 1 R. I., 125; Cunningham *v.* Buckingham, 1 Ohio, 264; Rogers *v.* Jones, 8 N. H., 264; Bailey *v.* Richardson, 15 Eng. L. & Eq., 218; Havens *v.* Bliss, 26 N. J. Eq., 363.

§ 274. **Modified by Registry Laws.**— The application of this doctrine to possession under unregistered conveyances, has, it is true, been somewhat modified by the registry laws,[1] and in one state, at least, it has been so frequently held, under the recording act of that commonwealth, that possession under an unrecorded deed will not amount to notice of the title by which the possessor holds, that it may now be regarded as a settled rule of property within that jurisdiction.[2] There, the statute provides in substance that nothing short of actual notice of an unrecorded deed will suffice to invalidate the title of a subsequent purchaser or mortgagee, and it is held that proof of such notice is not made out, simply by showing that the grantee under the unrecorded instrument was in open occupation of the land, and the subsequent purchaser had knowledge of such occupation. Possession is at most considered as sufficient to put subsequent purchasers upon inquiry, and under the strict provisions of the statute, this is not equivalent to notice, for the reason that the purchaser is not bound to inquire beyond the public record of conveyances, and his failure to do so does not cast upon him either an imputation of fraud or gross negligence. In any event mere possession is not conclusive upon the purchaser. The effect is to put him upon inquiry, and if it can be shown that, prior to purchase from the holder of the record title, he followed up the inquiry in good faith, the presumption arising from possession by another will be overcome.[3]

§ 275. **Evidence of Actual Notice.**— Under a statute of precisely similar import, in the state of Missouri,[4] the supreme court, by repeated decisions, have settled the law

[1] Flagg *v.* Mann, 2 Sumn., 486; Harris *v.* Arnold, 1 R. I., 126; Hewes *v.* Wiswall, 8 Greenl., 94; Emmons *v.* Murray, 16 N. H., 385.

[2] Sibley *v.* Leffingwell, 8 Allen, 584: Dooley *v.* Wolcott, 4 Allen, 406; Mara *v.* Pierce, 9 Gray, 306; Pomroy *v.* Stevens, 11 Metc., 244. But see Cunningham *v.* Pattee, 99 Mass., 248.

[3] Fair *v.* Stevenot, 29 Cal., 486; Thompson *v.* Pioche, 44 Cal., 508.

[4] Wag. Stat., p. 277, § 26.

upon a construction of the statute, directly opposite to that adopted by the court of last resort of Massachusetts.[1] And even in Beatie *v.* Butler,[2] where a similar construction is given to the statute as in the Massachusetts cases, Judge Scott, in rendering the opinion, says: "The fact that another is in possession, when known to a purchaser, may be submitted to a jury, in connection with other circumstances, to show that he had actual notice of an adverse title." And again, "Actual notice does not require positive and certain knowledge, such as seeing the deed; but that is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life. When it is shown that purchasers are affected with a knowledge of such circumstances, there the foundation is laid from which the inference of actual notice may be drawn."[3] That portion of the opinion of the learned judge which repudiates the doctrine that actual notice may be derived from the possession of the premises by the adverse claimant is a mere *dictum* which does not meet with the concurrence of his associate.[4]

§ 276. **Sufficient to Put Purchaser Upon Inquiry.**— In a subsequent case,[5] heard before a full bench, this question was perhaps more directly involved, and Judge Leonard, delivering the opinion, while reversing and remanding the cause for error in instructing the jury, in substance, that possession raised the legal presumption of title in the possessor, uses the following language, which met the full concurrence of a majority of the court: "The fact of possession might be presumed to have been within the purchaser's knowledge;[6] and if knowledge is brought home to the pur-

[1] Vaughan *v.* Tracy, 22 Mo., 415; S. C., 25 Mo., 318. *Contra,* Beatie *v.* Butler, 21 Mo., 313.

[2] *Supra.*

[3] See, also, Curtis *v.* Mundy, 3 Metc., 405.

[4] Separate opinion by Judge Ryland, in same case, 21 Mo., 325.

[5] Vaughan *v.* Tracy, 22 Mo., 415.

[6] Noyes *v.* Hall, 97 U. S., 34; Cabeen *v.* Breckenridge, 48 Ill., 91; Brown *v.* Gaffney, 28 Ill., 149; Farmers' Loan, etc., Co. *v.* Maltby, 8 Paige, 361; Doyle *v.* Stevens, 4 Mich., 87.

chaser, that a third person is in the possession and apparent ownership of the land, it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee, under a title derived from a former owner." Later cases by the same court, as cited in the note, fully sustain this view of the law.[1]

§ 277. **Same.**— Under a statute similar to that of the states of Massachusetts and Missouri, the supreme court of the state of Maine, although denying the doctrine of *constructive* notice of unregistered conveyances made subsequent to the enactment of the law, by possession under such conveyances, have taken substantially the same view of what may be considered *actual* notice as the supreme court of Missouri.[2] That possession and improvement by the claimant, brought to the knowledge of the purchaser, where such possession is taken under the prior purchase, is sufficient to put the subsequent purchaser upon inquiry as to the character of such possession; and if the inquiry be made, it will be presumed, in the absence of evidence to the contrary, that it resulted in knowledge of any title or interest in the premises, pursuant to which the occupant held.[3]

§ 278. **Effect of Knowledge of Possession.**— Where the provisions of the recording act are less strict, with respect to the kind of notice required to affect subsequent purchasers, and simply provide that those who purchase upon the faith of the record, but with *notice* of prior legal or equitable titles, there seems to be no question but that the possession of such claimant will as effectually notify subsequent

[1] *Infra*, § 278.

[2] See Hanly *v.* Morse, 32 Me., 287; Boggs *v.* Anderson, 50 Me., 161; Clark *v.* Bosworth, 51 Me., 528; Beal *v.* Gordon, 55 Me., 482; Spofford *v.* Weston, 29 Me., 140; Hull *v.* Noble, 40 Me., 459.

[3] Butler *v.* Stevens, 26 Me., 484; M'Laughlin *v.* Shepherd, 32 id., 143; Hackwith *v.* Damron, 1 Mon., 235; Johnson *v.* Clark, 18 Kan., 157; Watkins *v.* Edwards. 23 Tex., 443; Ill. Cent. R. R. *v.* McCullough, 59 Ill., 166; Rogers *v.* Hussey, 36 Iowa, 664; Smith *v.* Gibson, 15 Minn., 89; Tunison *v.* Chamblin, 88 Ill., 378.

parties as any other circumstance the knowledge of which may be brought home to them.[1]

§ 279. **Voluntary Ignorance.**— The theory upon which the cases proceed in holding possession to be implied notice, or evidence of notice, which can only be overcome by a purchaser by proof that the inquiries suggested by this circumstance were followed out without disclosing any title or interest adverse to his grantor, is not that there is anything corrupt or vicious in the acquisition of title to premises occupied by another than the grantor.[2] The only effect which the occupancy of the premises can have is to excite inquiry with reference to the title; and any failure on the part of such purchaser to make the inquiry is regarded as an intentional avoidance of the truth which would have been disclosed. His ignorance being voluntary, a purchase by him would be as clearly fraudulent as though he had purchased with full knowledge of the adverse claim, and with the express intention of circumventing the party in possession.[3]

[1] Farnsworth *v.* Childs, 4 Mass., 637; Norcross *v.* Widgery, 2 Mass., 506; Davis *v.* Blunt, 6 Mass., 487; Prescott *v.* Heard, 10 Mass., 60; Governeur *v.* Lynch, 2 Paige, 300; Sailor *v.* Hertzog, 4 Whart., 259; Lightner *v.* Mooney, 10 Watts, 407; Knox *v.* Thompson, 1 Littell, 350; Kerr *v.* Day, 14 Pa. St., 112; Jacques *v.* Weeks, 7 Watts, 261; Lewis *v.* Bradford, 10 Watts, 67; Boggs *v.* Varney, 6 Watts & Serg., 469; Dixon *v.* Doe, 1 Sm. & Marsh., 70; Wilty *v.* Hightower, 6 id., 345; Macon *v.* Sheppard, 2 Humph., 335; Taylor *v.* Lowenstein, 50 Miss., 278; Groff *v.* Ramsey, 19 Minn., 44; Morrison *v.* March, 4 Minn., 422; Dunks *v.* Fuller, 32 Mich., 242; Forest *v.* Jackson, 56 N. H., 357; Daniels *v.* Davidson, 16 Ves., 249; Taylor *v.* Stibbert, 2 Ves., 437; Truesdale *v.* Ford, 37 Ill., 210; Dunlap *v.* Wilson, 32 id., 517; Bradley *v.* Snyder, 14 id., 263; Tankard *v.* Tankard, 79 N. C., 54; Webber *v.* Taylor, 2 Jones, Eq., 9; Taylor *v.* Kelly, 3 id., 240; Edwards *v.* Thompson, 71 N. C., 177; School Dist. *v.* Taylor, 19 Kans., 287; Emmons *v.* Murray, 16 N. H., 385.

[2] Cook *v.* Travis, 22 Barb., 338; Faust *v.* Smith, 23 N. Y., 252.

[3] Grimston *v.* Carter, 3 Paige, Ch. 421,—Opinion of the Chancellor, p. 426; Flagg *v.* Mann, 2 Sumn., 486, 554; 4 Kent, Com., 179, 180; Daniels *v.* Davidson, 16 Ves., 249; Taylor *v.* Stibbert, 2 Ves. Jr., 440; Hall *v.* Smith, 14 Ves., 426; Crofton *v.* Ormsby, 2 Sch. & Lefr., 595; Eply *v.* Witherow, 7 Watts, 163; Jacques *v.* Weeks, 7 Watts, 261; Buttrick *v.* Holden, 13 Met.,

§ 280. **Character of Possession.**—It is not always a question of easy determination, whether the possession is sufficiently distinct and unequivocal to give notice to subsequent parties. It has, however, been held that where one acre was purchased in a tract of twenty acres, and set with willows, which the purchaser cut regularly every year, for the purpose of carrying on his business of basket-making, that such possession and acts of ownership, under a deed which the purchaser had neglected to record, was sufficient to give notice of his title to a purchaser at sheriff's sale, of the twenty-acre tract of which his own acre originally formed a part.[1]

355: Sargeant *v.* Ingersoll, 7 Pa. St., 340; Smith *v.* Gibson, 15 Minn., 89: Bogue *v.* Williams, 48 Ill., 371; O'Rourke *v.* O'Connor, 39 Cal., 442; Moss *v.* Atkinson, 44 Cal., 3; Rogers *v.* Jones, 8 N. H., 264; Hull *v.* Noble, 40 Me., 459; Mullins *v.* Wimberly, 50 Tex., 457; Strickland *v.* Kirk, 51 Miss., 795; Brown *v.* Volkenning, 64 N. Y., 76; Van Keuren *v.* Cent. R. R., 38 N. J. L., 165; Tunnison *v.* Chamblin, 88 Ill., 378; Warren *v.* Sweet, 31 N. H., 332; Littleton *v.* Giddings, 47 Tex., 109; Shepardson *v.* Stevens, 71 Ill., 646; Maul *v.* Rider, 59 Pa. St., 167; Baker *v.* Bliss, 39 N. Y.. 70; Stearns *v.* Gage, 79 N. Y., 102; Buck *v.* Paine, 50 Miss., 648; Holmes *v.* Powell, 8 De G., M. & G., 572.

[1] Krider *v.* Lafferty, 1 Whart., 303. See Hatch *v.* Bigelow, 39 Ill., 546, *infra*, § 288 *et seq.*

In Unger *v.* Mooney, 63 Cal., 586, the question was as to the notoriety of the adverse possession of defendant as purchaser of the entire tract from one of two tenants in common being sufficient to give notice to his co-tenant that the holding was hostile to the latter's claim. It was decided that the execution and delivery of the deed by the co-tenant was an ouster or disseizin, and that the subsequent occupation by the grantee, for the statutory period, paying the taxes and collecting the rents and profits without accounting to the plaintiff, was sufficient notice to him to bring the case within the rule governing adverse possession that requires it to be open and notorious. See, also, Thompson *v.* Pioche, 44 Cal., 508; Trustees, etc., *v.* Kirk, 84 N. Y., 220; Culver *v.* Rhodes, 87 N. Y., 354; Abell *v.* Harris, 11 Gill & J., 371; Portis *v.* Hill, 3 Tex., 278; Grim *v.* Curley, 43 Cal., 250; Miller *v.* Myles, 46 Cal., 535; Prescott *v.* Nevens, 4 Mason, 330; Clarke *v.* Courtney, 5 Peters, 319; Clymer's Lessee *v.* Dawkins, 3 How., 690; Culler *v.* Motzer, 13 Serg. & R., 358; Horne *v.* Howell, 46 Ga., 9; Long *v.* Stapp, 49 Mo., 508; Smith *v.* Yule, 31 Cal., 180; Pell *v.* McElroy, 36 Cal., 268.

§ 281. **Possession by Tenant.**— As to whether a purchaser may be affected with notice of a claim or title adverse to his grantor, by possession, when the owner of such adverse title is not in actual occupancy of the premises in question, the authorities in this country seem to be in conflict. In England the weight of authority inclines upon the side of restricting the operation of such possession to notice of the title of the actual occupant. The possession of a tenant under a lease is notice simply of his tenancy, and not of his landlord's title.[1]

§ 282. **Notice of Interest Claimed by Occupant.**— In Beatie *v.* Butler,[2] it is held that possession by the tenant of a mortgagor was not notice of an agreement between the mortgagor and mortgagee, that the latter should not demand of the former a strict compliance with the terms of his mortgage; but the same conclusion must have been reached had the mortgagor himself been in possession. The court, in deciding the case of Flagg *v.* Mann,[3] also inclines to follow the English rule restricting possession in its

[1] Barnhart *v.* Greenshields, 28 Eng. L. & Eq., 77; 2 Sug. on Vend., §§ 762, 763; Smith *v.* Dall, 13 Cal., 510; Jones *v.* Smith, 1 Ha., 43; Oxwith *v.* Plummer, 2 Vern., 636. But see *infra*, §§ 284–6; Daubenspeck *v.* Platt, 22 Cal., 330. But the purchaser is bound by all the equities subsisting between the tenant and the vendor, whether it be an interest connected with his tenancy or one claimed under a collateral agreement. McMechan *v.* Griffing, 3 Pick., 149; Disbrow *v.* Jones, Harring. Ch., 48; Knight *v.* Bowyer, 2 D. & J., 450; Allen *v.* Anthony, 1 Meriv., 282; Powell *v.* Dillon, 2 Ba. & Be., 416. *Contra*, Kendall *v.* Lawrence, 22 Pick., 540; Bush *v.* Golden, 17 Conn., 594; Williams *v.* Sprigg, 6 Ohio St., 585; Matthews *v.* Demerritt, 22 Me., 312; Dawson *v.* Danbury Bank, 15 Mich., 489. Where a lessee in possession makes a contract to purchase, his possession has been held to be notice of his rights as purchaser. Taylor *v.* Stibbert, 2 Ves., 437; Wilbraham *v.* Livesey, 18 Beav., 206. But see Hanbury *v.* Litchfield, 2 My. & K., 629.

[2] 21 Mo., 313.

[3] 2 Sumn., 557; Daniels *v.* Davison, 16 Ves., 249 (§ 279, n. 2); Allen *v.* Anthony, 1 Meriv., 282; Meux *v.* Maltby, 2 Sw., 281; Powell *v.* Dillon, 2 Ball & B., 416; Lewis *v.* Bond, 18 Beav., 85; Moreland *v.* Richardson, 24 id., 33; Hanbury *v.* Litchfield, 2 My. & K., 629; Jones *v.* Smith, 1 Hare, 43.

effect as notice, to the interest claimed by the actual occupant.

§ 283. **Notice of Interest of Occupant's Creditors.**— Where a fraudulent conveyance was made, and the grantor remained in possession by his tenants, it was held, in a contest between the creditors of the fraudulent grantor and the purchasers at an execution sale of the land as the property of the fraudulent grantee, that such possession was notice of the title which still remained in the grantor, subject to his creditors' claims.[1]

§ 284. **Tenant's Occupancy, Notice of Landlord's Title.** So where the land was located in a new and heavily timbered country, and was left by the equitable owners in charge of a tenant, who cut timber from the land, and exercised such other acts with respect to the premises as left the impression in the neighborhood that the land belonged to the absent landlord, it was held that this was sufficient notice to any one subsequently dealing with the title to put him upon inquiry.[2]

§ 285. **Same.**—It was also held in Wright *v.* Wood,[3] where the plaintiff claimed under a deed from the heirs of the former owner, and the defendant under an unrecorded deed from the ancestor, that the possession of one, either in person or by his tenant, was notice of an unrecorded title; but it was also held that the possession of a mere intruder was not notice of the title of a stranger.

§ 286. **Consistency of Foregoing Doctrine.**— There seems no good reason why, if it be admitted that possession is notice, or evidence of notice, there should be any modification of the rule that possession by the tenant is the pos-

[1] Hood *v.* Fahnestock, 1 Pa. St., 470.

[2] Wickes *v.* Lake, 25 Wis., 71; Dickey *v.* Lyon, 19 Ia., 544; Pittman *v.* Gaty, 10 Ill., 186; Met. Bank *v.* Godfrey, 23 Ill., 579. *Contra* (Eng.), 2 Leading Cases in Equity (4th Am. ed.), p. 133; Jones *v.* Smith, 1 Hare, 43; Barnhart *v.* Greenshields, 9 Moore, P. C., 18; Hanbury *v.* Litchfield, 2 M. & K., 629; Flagg *v.* Mann, 2 Sumn., 486; Beatie *v.* Butler, 21 Mo., 313; Veazie *v.* Parker, 23 Me., 170; Jacques *v.* Weeks, 7 Watts, 261.

[3] 23 Pa. St., 120.

session of his landlord. If the purchaser has followed up the suggestion which the possession of the premises by a third party implies, he will inquire of the actual occupant, with a probability of learning that he holds as lessee of another. Inquiry cannot safely stop here; for the next step suggested by the circumstances would be to inquire of the landlord. But should the lessee refuse to disclose the name of his lessor, or falsely lay claim to the fee, it can hardly be required of the purchaser to look further. Having inquired of the person to whom all the circumstances point as best qualified to impart information concerning the title of which possession is the sole emblem, he may safely rely upon the information thus acquired as absolutely true. The possession by which the landlord holds through a tenant may be said to be *constructive*, and, for some purposes, will be distinguished from *actual* possession, and in this respect there is a seeming conflict between the cases that give effect to the tenant's possession as notice of the landlord's rights, and those which lay down the rule that possession must be actual.[1] But the conflict is only apparent where the courts are inclined to disregard terms when their use creates distinctions which are of no value in determining rights. For all the purposes of notice, the possession of the tenant may fairly be regarded as the actual possession of the landlord. It is sufficient to put the purchaser upon inquiry, and, in the absence of evidence to the contrary, it will be presumed that inquiry of the tenant will lead to knowledge of the truth.[2]

§ 287. Possession No Evidence of Title in Stranger.— Where, however, at the time of the purchase there is one

[1] *Infra*, § 288 *et seq.*

[2] Edwards *v.* Thompson, 71 N. C., 177; Cunningham *v.* Pattee, 99 Mass., 248; O'Rourke *v.* O'Connor, 39 Cal., 442; Thompson *v.* Fioche, 44 Cal., 508; Kerr *v.* Day, 14 Pa. St., 112; Nelson *v.* Wade, 21 Ia., 49; Dicky *v.* Lyon, 19 Ia., 544; *supra*, § 284. See, also, Feilden *v.* Slater, L. R., 7 Eq., 523; Parker *v.* Whyte, 1 H. & M., 167; Wilson *v.* Hart, L. R., 1 Ch., 463; Clements *v.* Welles, L. R., 1 Eq., 200; Crofton *v.* Ormsby, 2 Sch. & Lef., 583.

in possession, who not only holds adversely to the grantor, but to the equitable owner, or grantee under an unrecorded instrument, in a subsequent contest concerning the title, this possession can only be availed of as notice by such possessor and those in whose right he pretends to hold. It could not be used either as notice or evidence of notice of any title or interest claimed by a stranger; for the inquiry which it might be presumed to excite would not in the natural course of events develop such stranger's title.[1]

§ 288. **Must be Actual, Notorious and Continuous.**— Subject to the doctrine that possession may be held by the owner of the fee through his tenant or lessee, it is held that the possession upon which the claimant relies as giving notice of his rights must be *actual, open and notorious*, and, so far as is consistent with the uses for which the property is occupied, *continuous*.[2] It is not to be understood, however, when the one in possession resides upon the land, that his temporary absence from home will affect to any extent whatever, the character of his possession. Nor, upon the other hand, that his personal presence thereon at stated intervals, when such presence is transitory, and entirely disconnected with any use of the land, would be such possession as would charge purchasers or incumbrancers with notice of his title.[3]

[1] Wright *v.* Wood, 23 Pa. St., 120.

[2] Brown *v.* Volkenning, 64 N. Y., 76; Kendall *v.* Lawrence, 22 Pick., 540; Truesdale *v.* Ford, 37 Ill., 210; Blankenship *v.* Douglass, 26 Tex., 225; Ely *v.* Wilcox, 20 Wis., 523: Patten *v.* Moore, 32 N. H., 382; Havens *v.* Dale, 18 Cal., 359; Rogers *v.* Jones, 8 N. H., 264; Williams *v.* Sprigg, 6 Ohio St., 585; Holmes *v.* Stout, 10 N. J. Eq., 492; Coleman *v.* Barklew, 27 N. J. Law, 357; Wickes *v.* Lake, 25 Wis., 71; Troy City Bank *v.* Wilcox, 24 id., 671.

[3] Kendall *v.* Lawrence, 22 Pick., 540; Holmes *v.* Powell, 8 De G., M. & G., 572; Noyes *v.* Hall, 7 Otto, 34; Cabeen *v.* Breckenridge, 48 Ill., 91; Dunlap *v.* Wilson, 32 id., 517; Bradley *v.* Snyder, 14 id., 263; Tankard *v.* Tankard, 79 N. C., 54; Bogue *v.* Williams, 48 Ill., 371; Martin *v.* Jackson, 3 Casey, 504; Mechan *v.* Williams, 12 Wright, 238; McMechan *v.* Griffing, 3 Pick., 149. See, also, Miles *v.* Langley, 1 Russ. & M., 39; 2 id., 626; Jones *v.* Smith, 1 Hare, 43; Boggs *v.* Varner, 6 W. & Serg., 469; Hewes *v.* Wiswell, 8 Me., 94.

§ 289. **Occupancy by Church Society.**— But where there had been a parol conveyance to a church society, of a portion of a tract of land, which conveyance was followed by the erection of a building suitable for public worship, and was so used by the society, this was held as sufficient notice to a subsequent purchaser of the original tract, including the church lot, that the society had an interest in such property.[1]

§ 290. **Exclusive.**— Another essential feature of the possession which is set up as notice to a subsequent purchaser is that it must be *exclusive*, at least so far as such subsequent purchaser's grantor is concerned.[2] Accordingly, where a father conveyed to his son, upon certain conditions, an undivided one-third of a farm, which was at the time occupied by them as tenants in common, and the son removed from the farm during the life-time of the father, who remained in sole possession, it was held that the possession of the father would not be notice to parties to whom the son subsequently mortgaged his interest, unless notice could be brought home to the mortgagees, at the time such mortgage was given, not only of the father's possession, but that it was held adversely to his co-tenant.[3] This was so held upon the familiar principle that the possession of real estate by one of several tenants in common will not be construed as adverse to his co-tenants, for the reason that such possession is perfectly consistent with the extent of his own interest in the land. To render his occupancy adverse to those who have an undivided interest in the premises, there must be positive and overt acts connected with his exercise of ownership such as will manifest an unmistakable intention on his part to exclude his co-tenants from the enjoyment of the property; otherwise his possession will be regarded not

[1] Macon *v.* Sheppard, 2 Humph., 335.

[2] Kendall *v.* Lawrence, 22 Pick., 540; Smith *v.* Yule, 31 Cal., 180; Bell *v.* Twilight, 22 N. H., 500; Wright *v.* Wood, 11 Harris, 120, 130–31.

[3] Buckmaster *v.* Needham, 22 Vt., 617.

only as a declaration of his own proprietary rights, but those of his co-tenants as well.[1]

§ 291. **Unequivocal.**—So the possession must be unequivocal and easily distinguished from that of the grantor or any one else. It is not enough, where one has purchased adjoining woodland, that he repairs the fences, removes dilapidated buildings, clears off rubbish and depastures his cattle upon the newly acquired land. These acts are too disconnected in their character to serve as notice of title. It would be improbable that a stranger, by looking at the land before purchasing, would gain such a knowledge of these detached acts of ownership as to put him upon inquiry as to why one who, so far as appeared by the record, was a stranger to the title, should be exercising this control over the property.[2]

§ 292. **Doubtful in Extent.**—So where a party had an equitable title to one-half of a tract of land, which was to be divided by a line drawn through the tract dividing it into equal portions, different from the division made by the government survey, but there was no proof that such line was ever run between the two portions, and there were no monuments indicating the boundaries between the two portions, and no proof of actual occupancy or cultivation up to such imaginary line, it was held, in a contest between such equitable owner and an innocent purchaser of the opposite half of the tract as designated by the description in the government survey, that possession of the portion claimed by the equitable owner could not operate as notice of his claim of title beyond the government section lines.[3]

§ 293. **Same.**—So, also, where one bought by parol a corner of the tract of land occupied by his grantor, paid

[1] Brown *v.* Volkenning, 64 N. Y., 76; Wickes *v.* Lake, 25 Wis., 71; Troy City Bank *v.* Wilcox, 24 Wis., 671; Martin *v.* Jackson, 27 Pa. St., 504; Patten *v.* Moore, 32 N. H., 382; Holmes *v.* Stout, 3 Green's Ch., 492.

[2] McMechan *v.* Griffing, 3 Pick., 149; Brown *v.* Volkenning, 64 N. Y., 76; Hewes *v.* Wiswell, 8 Me., 94.

[3] Hanrick *v.* Thompson, 9 Ala., 409.

the purchase price, went into possession, and erected buildings thereon, but without making any survey or setting up any monuments to designate the boundary line between the tracts, and the buildings upon the portion reserved by the grantor had the appearance of forming a part of one and the same establishment with those erected by the purchaser, it was held that such parol purchaser, having ample opportunity to protect his interest by giving express notice, and failing to do so, could not avail himself of such uncertain and equivocal possession, to charge innocent purchasers at a sale under execution against his grantor, with notice of his equity.[1] But paving the sidewalk in front of the premises, and putting up a placard offering the lot for sale, was held sufficient notice of title.[2]

§ 294. Possession, and Right Claimed Contemporaneous.— It is also essential that the possession which is to operate as notice of title shall be contemporaneous with the existence of the right or title it is relied upon to establish, and prior to the subsequent purchase. Therefore, it was held in an action of ejectment, that although the defendant was in actual, open, undisputed and exclusive possession of the premises in question, holding under a quitclaim deed at the time the same was conveyed to plaintiff, such possession was only notice of such title or interest as he then had. And it appearing that the grantor under whom he claimed at that time had never been seized of the property, a deed of which plaintiff had no notice, made to defendant after he had quit the possession, being unrecorded, the previous possession would not affect the subsequent purchaser with notice of his after-acquired title.[3]

[1] Billington *v.* Welsh, 5 Binn., 129.

[2] Hatch *v.* Bigelow, 39 Ill., 564.

[3] Rupert *v.* Mark, 15 Ill., 540; New York Life Ins. Co. *v.* Cutler, 3 Sandf. Ch., 176; Oxwith *v.* Plummer, 2 Vern., 636; Barnhart *v.* Greenshields, 9 Moo. P. C., 18; Scott *v.* Gallagher, 14 Serg. & R., 333. See Kerr *v.* Day, 2 Harris, 112; Wood *v.* Farmere, 7 Watts, 382; Matthews *v.* Demeritt, 22 Me., 312; McKeckine *v.* Hoskins, 23 id., 230; Rogers *v.* Jones, 8 N. H., 264; Daubenspeck *v.* Platt, 22 Cal., 330. *Contra*, McMechan *v.*

§ 295. **Instance of Exception to the Rule.**— Where A. claimed title to a parcel of land by successive conveyances under an unrecorded deed, and went into possession, and B., a rival claimant, traced his title through a prior deed which was also unrecorded at the date of the deed to A., it was held that under a statute giving priority to the deed first recorded after the lapse of six months, the grantee of B., who took during A.'s possession, was not thereby affected with notice of any superior equity in A., and upon being beforehand with him in getting his deed first filed for record, would have both the legal and equitable estates.[1]

§ 296. **Effect of Abandoning Possession.**— In cases where the possession relied upon as notice to the subsequent purchaser, or evidence of such notice, was prior to the acquisition of title by him, and at the date of his deed had been abandoned or surrendered, it will not have the effect of imposing upon such subsequent party the duty of making inquiry as to the character of such occupancy.[2] In fact, if the possession of real estate may fairly be regarded as notice of a claim of title, the surrender of such possession by a parity of reason should be looked upon as an abandonment of the claim. Therefore, the mere circumstance of a former adverse possession by one with no apparent title, cannot in any event have the slightest weight in charging a subsequent purchaser with notice of any equities in favor of the possessor.[3]

§ 297. **Possession Referred to Record Title.**— Circumstances may arise where one having title to real estate, and being in possession under his title, may nevertheless be prevented from relying upon such possession as notice to subse-

Griffing, 3 Pick., 149; Kendall *v.* Lawrence, 22 id., 540; Bush *v.* Golden, 17 Conn., 594; Williams *v.* Sprigg, 6 Ohio St., 585; Dawson *v.* Danbury Bank, 15 Mich., 489; Meehan *v.* Williams, 48 Pa. St., 238; Boggs *v.* Varner, 6 Watts & S., 469; Hewes *v.* Wiswell, 8 Me., 94; Wright *v.* Wood, 23 Pa. St., 120.

[1] Lightner *v.* Mooney, 10 Watts, 407.

[2] Ehle *v.* Brown, 31 Wis., 405.

[3] Campbell *v.* Brackenridge, 8 Blackf., 471.

quent parties. As, for example, where in addition to the title under which the proprietor occupies the premises, and which either rests in parol or is unrecorded, the record also shows a title under which he would be entitled to possession. In such a case his possession will be referred to his record title in preference to any other, and the purchaser will not be affected with notice of any undisclosed title or interest which the possessor may have. Thus, where a mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not be by such possession charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase.[1]

§ 298. **Same.**— This exception is obviously just and reasonable. When a party places upon record an instrument, the provisions of which are consistent with his possession of the premises, while the circumstance of his being in possession undoubtedly has a tendency to excite inquiry in the minds of those contemplating a purchase, the fact that he has placed the evidence of his right to occupy upon record, where it is accessible to the whole world, arrests inquiry at that point, and plainly informs the purchaser that he may rest securely upon the knowledge already obtained.[2]

§ 299. **Claim Inconsistent with Record Title.**— So the possessor may by his own act, in putting upon the record an instrument inconsistent with title in himself, or by executing and delivering such a recordable instrument, be estopped

[1] Plumer *v.* Robertson, 6 Serg. & R., 179; Palmer *v.* Bates, 22 Minn., 532; Great Falls Co. *v.* Worster, 15 N. H., 412; Woods *v.* Farmere, 7 Watts, 382; Corpman *v.* Baccastow, 84 Pa. St., 363; Smith *v.* Yule, 31 Cal., 180; White *v.* Wakefield, 7 Sim., 401; Rice *v.* Rice, 2 Drew, 73; Muir *v.* Jolly, 26 Beav., 143; Staples *v.* Fenton, 5 Hun, 172; Bell *v.* Twilight, 22 N. H., 500; Crassen *v.* Swoveland, 22 Ind., 427; Newhall *v.* Pierce, 5 Pick., 450.

[2] Woods *v.* Farmere, 7 Watts, 385.

from relying upon his possession as evidence to subsequent purchasers that he claims title to the premises.[1] In the case cited, defendant had conveyed the land in question to one in whom he placed confidence, subject to a secret trust. The deed of conveyance was absolute on its face and was duly recorded. Relying upon the record, plaintiff purchased the premises from the apparent grantee for value, who in making the sale was guilty of a breach of trust. But the plaintiff took without knowledge or notice of the trust, although the defendant, after making the conveyance, remained in possession and openly exercised acts of ownership over the property.[2]

§ 300. **Notice of Reservation of Easement.**—A well recognized exception to the above doctrine is where possession is relied upon as notice or evidence of notice of a parol reservation of an easement, upon a conveyance of the legal title to the premises, when such easement is essential to the enjoyment of adjacent premises, the title to which remains in the grantor and possessor of such easement. As where there were two pieces of land lying adjacent to each other, with different owners, upon one of which there was a mill, and upon the other a race which was appurtenant to the mill. The owner of the mill property held, by a prior parol reservation, a right to the use of the race on the adjacent property, and upon his subsequent acquisition of the legal title to both tracts, and his conveyance by deed with cove-

[1] Scott *v.* Gallagher, 14 Serg. & R., 333.

[2] See, also, Newhall *v.* Pierce, 5 Pick., 450; New York Life Ins. Co. *v.* Cutler, 3 Sandf. Ch., 176; Van Keuren *v.* Central R. R. Co. of New Jersey, 38 N. J. L., 165; White *v.* Wakefield, 7 Sim., 401; Rice *v.* Rice, 2 Drew, 1; Muir *v.* Jolly, 26 Beav., 143; Bloomer *v.* Henderson, 8 Mich., 395; Scott *v.* Gallagher, 14 S. & R., 333; Dawson *v.* Danbury Bank, 15 Mich., 489; Cook *v.* Travis, 20 N. Y., 400; Reed *v.* Gannon, 50 N. Y., 345. *Contra*, Ill. Cent. R. Co. *v.* McCullough, 59 Ill., 166; Metropolitan Bank *v.* Godfrey, 23 Ill., 579; Pell *v.* McElroy, 36 Cal., 268; Wright *v.* Bates, 13 Vt., 341; Grimstone *v.* Carter, 3 Paige, 421; Hopkins *v.* Garrard, 7 B. Mon., 312; Webster *v.* Maddox, 6 Me., 256; McKeckine *v.* Hoskins, 23 Me., 230; Jacques *v.* Weeks, 7 Watts, 261; Burton *v.* Shotwell, 6 Cent. L. J., 31 (Ky.).

nants of seizin, without mention of the easement, of the tract upon which the water privilege was claimed, it was held that the continued possession and use of this privilege, both before and after his obtaining title to the property, was sufficient notice of the original reservation to put his grantee upon inquiry.[1] In delivering the opinion in this case, Mr. Chief Justice Gibson makes a distinction between the facts and those in the prior case of Woods *v.* Farmere.[2] There it was decided in substance that an owner of distinct titles, who gives record notice of one of them, abandons, as to purchasers, the other, of which possession would otherwise be implied notice. "That, however," says the learned judge, "is not this case; for Isaac Silverthorn had but one title to the water-right, and held out neither notice nor pretense of any other." Without presuming to question the justice of this decision it is difficult to avoid the conclusion that it is exceptional to the rule announced in Woods *v.* Farmere, for the reason that the possession of the water-right was clearly *consistent* with the defendant's ownership of the fee as it appeared by his recorded deed. But whether under the circumstances of the case his conveyance to plaintiff was *inconsistent* with a continuance of such right is another matter.

§ 301. Exception to Rule Requiring Consistency.— Another exception allowed in favor of the validity of notice of title by possession, of one who has executed and delivered an instrument inconsistent with the title claimed, which was placed upon record, was where the deed from the tenant in possession merely gave his grantee instantaneous seizin, which was utterly divested by the contemporaneous reconveyance to his grantor and two sons.[3] Here it was held as against an attaching creditor of the first grantee, that the possession of the tenants was sufficient to put creditors on inquiry, notwithstanding the deed of such grantee

[1] Randall *v.* Silverthorn, 4 Pa. St., 173.

[2] 7 Watts, 385; *ante*, § 298.

[3] Webster *v.* Maddox, 6 Me., 256.

was first recorded, and the attachment was levied, and execution issued on the judgment was duly extended and recorded during the intermediate time between the recording of the two deeds; and there was no visible change of possession, the sons residing upon the premises as members of their father's family, as they had done before. From the report of this case it appears that the attachment was levied so soon after the recording of the deed to the debtor, that it is not probable that the credit from which the debt arose was obtained upon the faith of the record title. The purpose of the transaction stands plainly revealed as a circuitous conveyance, by the father to the sons, of an interest in the land, and the first grantee was employed as a mere conduit for the title. The facts of this case may be sufficient to reconcile one to an exception to what may itself be regarded as an exception to the doctrine of notice by registration; but were the facts of a case the same, except that an innocent purchaser occupied the position of the attaching creditor in this case, the transitory nature of the title vested in the grantee whose deed was recorded would be no protection to the grantor's possession.

§ 302. **Possession to Begin with Unrecorded Title.**— It has also been decided, where possession by one's lessees or tenants was regarded as sufficient, that their tenancy must commence after the acquisition of the title evidenced by such possession. In other words, where, at the time of the sale, the grantor was in possession by his tenants, who afterwards attorned to the grantee, the grantor's deed being unrecorded, this was held insufficient to charge even an attaching creditor of the grantor with notice of such unregistered conveyance.[1]

§ 303. **Possession as Lessee Changed to Possession as Owner.**— So where one who held possession as lessee, and after the expiration of the term remained a tenant at sufferance for a short time and then purchased the fee, it was decided that such possession would be referred to the origi-

[1] Loughridge *v.* Bowland, 52 Miss., 546.

nal tenancy under which it commenced, and would not stand for notice of the title under which she held at the date of the subsequent purchase.[1]

§ **304. The Rule in Mississippi.**— These cases seem to settle the law upon this question for the state of Mississippi, upon a theory peculiar to that jurisdiction. Drawing the inference of notice of title from the fact of possession by the claimant is there regarded as resting with the neighborhood, or with the subsequent party to the title, instead of with the court or jury. Elsewhere, possession derives its force as a circumstance tending to fix notice of a prior equity or unregistered conveyance upon subsequent parties, from the fact that it is sufficient to put them upon inquiry, and for a failure to inquire *mala fides* is imputed to them. Here it seems requisite, not only that the subsequent party must have notice of the possession, but his mind must be free from doubt as to the character of such possession before he inquires. Other courts decide that the notice inferred from possession shall be of such title as the possessor had at the time of the subsequent purchase, limiting the application of the principle to cases where the tenant in possession has not estopped himself from relying upon his possession as notice, by placing upon record a title inconsistent with that claimed, or a different title which is perfectly consistent with his possession. In the latter event, his possession will be referred to his record title. These cases, however, decide that possession by a purchaser after his term expires will be referred to his original lease which is not a matter of record. There seems to be a difference of principle upon which these cases are decided from that

[1] Claiborne *v.* Holmes, 51 Miss., 146; Kerr *v.* Day, 14 Pa. St., 112; Cunningham *v.* Pattee, 99 Mass., 248. But see Daniels *v.* Davison, 16 Ves., 249; Crofton *v.* Ormsby, 2 Sch. & Lef., 583; Wilbraham *v.* Livesey, 18 Beav., 206; Powell *v.* Dillon, 2 B. & B., 416; Hervey *v.* Smith, 22 Beav., 499; Moreland *v.* Richardson, id., 596. See, also, Miles *v.* Langley, 1 R. & M., 39; White *v.* Wakefield, 7 Sim., 401; Nelthorpe *v.* Holgate, 1 Coll., 203; Oxwith *v.* Plummer, 2 Vern., 636.

governing those elsewhere determined, which we will not attempt to reconcile.[1]

§ 305. **Creditors Affected with Notice.**— From authorities already cited, as well as upon general principles, it is quite clear that subsequent purchasers and incumbrancers are not the only parties who may be affected by this species of implied notice, but that it may be invoked against creditors of the grantor.[2]

§ 306. **Possession of Chattels.**— The doctrine that the purchaser of chattels from one who has no possession thereof at the time of his purchase takes the same with full notice of all the rights of the one who has them in possession, is so well established as not to require the citation of authorities in its support. Possession is much more universally recognized as evidence of ownership in case of chattels than where the title to real property is involved. The inference follows naturally from the nature of the property and the manner of transferring the title thereto. Not only is possession notice of the interest of the possessor, but from the fact that the title to movable things is usually transmitted by manual delivery of the property, such possession is *prima facie* evidence of absolute ownership.[3]

[1] It is decided in a recent case that a son who occupied certain premises, the title to which was in his father, in subordination to his father's title, and who continued such possession after his father's death, would not be permitted to rest upon such possession, either before or after his father's death, as notice to a subsequent purchaser from other heirs, of a parol contract from his father to convey the property to him. Stone *v.* Cook, 79 Ill., 424.

[2] Kent *v.* Plumer, 7 Me., 464; Webster *v.* Maddox, 6 Me., 256; Newhall *v.* Pierce, 5 Pick., 450; Massey *v.* McIlwain, 2 Hill's Ch., 421; Macon *v.* Sheppard, 2 Humph., 335; Hackwith *v.* Damron, 1 Mon., 235.

[3] But see Chicago T. P. P. Co. *v.* Lowell, 60 Cal., 454.

CHAPTER V.

NOTICE FROM TITLE PAPERS.

§ 307. General Statement of the Doctrine.
308. Equivalent to Actual Notice.
309. Treated as Constructive Notice.
310. Modifications of the Rule.
311. Recitals in Original Patent.
312. Illustration.
313. Sufficient if Recitals Would Lead to Knowledge.
314. In Same Transaction.
315. Should be in Same Chain of Title.
316. Recitals Reasonably Certain.
317. Same.
318. Example of General Recital.
319. Uncertainty of Description.
320. Striking Peculiarities of Recital.
321. Recital in Will — In Lease.
322. Limitations Upon Effect of Recitals.
323. Recital of a Trust.
324. May be by Variety of Instruments.
325. Recital in Mortgages.
326. Books of Record.
327. Conveyance by Statute.
328. Facts Which May be thus Brought Home to Purchaser.
329. Contract to Convey.
330. Vendor's Lien.
331. Who Affected.
332. Different Kinds of Property.
333. Stocks Transferred by Executor.
334. Personal Property.
335. Inquiry Extends to Examination of Papers.
336. Deed of Real Estate Containing Bill of Chattels.

§ 307. General Statement of the Doctrine.— The notice to purchasers of interests in the subject of the purchase, which is derived from the papers by which the title is transmitted, affected or incumbered, is for obvious reasons confined almost exclusively to real estate. It is only in those

exceptional instances where personal property passes by written conveyances, or the title depends upon some instrument of writing, that it will be subject to the same rule. But it is not restricted to any particular class of papers. It embraces all written evidences of title known to the law, and, of all kinds of notice that may depend upon inference or presumption, is perhaps the most generally recognized.[1]

§ **308. Equivalent to Actual Notice.**— As a matter of fact, a purchaser of real estate may be totally ignorant of the recitals in his own deed; yet every recital of a fact affecting the title to the premises, contained in such deed, will be presumed to be known to such purchaser, and he will be affected with notice thereof in the same manner and to the same extent as though he had actual knowledge, though the statute interposes the provision that those only shall be charged who have actual notice.[2] Therefore it

[1] Frye *v.* Partridge, 82 Ill., 267; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill., 350; Rupert *v.* Mark, 15 Ill., 540; Merrick *v.* Wallace, 19 Ill., 486; Morris *v.* Hogle, 37 Ill., 150; Morrison *v.* Kelley, 22 Ill., 610; Doyle *v.* Teas, 5 Ill., 202; McConnell *v.* Reed, 5 Ill., 117; Wiseman *v.* Hutchinson, 20 Ind., 40; Croskey *v.* Chapman, 26 Ind., 333; Corbitt *v.* Clenny, 52 Ala., 480; Burch *v.* Carter, 44 Ala., 115; Witter *v.* Dudley, 42 Ala., 616; Dudley *v.* Witter, 46 Ala., 664; Campbell *v.* Roach, 45 Ala., 667; Newsome *v.* Collins, 43 Ala., 656; Deason *v.* Taylor, 53 Miss., 697; Allen *v.* Poole, 54 Miss., 323; Wailes *v.* Cooper, 24 Miss., 208; Johnson *v.* Gwathmey, 4 Litt., 317; Mueller *v.* Engeln, 12 Bush, 441; Major *v.* Buckley, 51 Mo., 227; Ridgeway *v.* Holliday, 59 Mo., 444; Long *v.* Weller, 29 Gratt., 347; Wood *v.* Krebbs, 30 Gratt., 708; Burwell's Ex'rs *v.* Fauber, 21 Gratt., 446; Stidham *v.* Mathews, 29 Ark., 650; Fitzhugh *v.* Barnard, 12 Mich., 105; Case *v.* Erwin, 18 Mich., 434; Pringle *v.* Dunn, 37 Wis., 449; Howard Ins. Co. *v.* Halsey, 8 N. Y., 271; Frost *v.* Beekman, 1 Johns. Ch., 288; Gibert *v.* Peteler, 38 N. Y., 165; Green *v.* Early, 39 Md., 223; Murrell *v.* Watson, 1 Tenn. Ch., 342; Malpas *v.* Ackland, 3 Russ. (Eng.), 273; Rafferty *v.* Mallory, 3 Biss., 362; Kerr *v.* Kitchen, 17 Pa. St., 433; Greenfield *v.* Edwards, 2 De G., J. & S., 582; Davies *v.* Thomas, 2 Young & C. Exch., 234; Pilcher *v.* Rawlins, L. R., 11 Eq., 53; 7 Ch., 259; Clements *v.* Wells, L. R., 1 Eq., 200; Robson *v.* Flight, 4 De G., J. & S., 608; Bacon *v.* Bacon, Tothill, 133; Bisco *v.* Earl of Banbury, 1 Ch. Cas., 287; Coppin *v.* Fernyhough, 2 Brown, Ch., 291.

[2] White *v.* Foster, 102 Mass., 375; George *v.* Kent, 7 Allen, 16; Wormley *v.* Wormley, 8 Wheat., 421; Oliver *v.* Piatt, 3 How., 333; Christmas

may be said that notice derived from the recitals in the deed to a purchaser is actual, though it clearly rests upon a presumption of law. It may be called actual, however, in the same sense that a written notice delivered to a party who never reads it may be called actual notice.[1]

§ 309. Treated as Constructive Notice.— The recitals of one's immediate deed being regarded as actual notice, it would seem to follow that where such recitals referred to other instruments, they would be sufficient to put the purchaser upon inquiry with respect to the instruments referred to, and thus make their recitals notice which might properly be classed as actual. In most of the cases, however, when it is sought to charge a purchaser with notice by the recitals contained in instruments affecting the title other than his own immediate deed, it is characterized in the books as constructive notice. It would be more accurately designated as *presumptive notice.*[2]

§ 310. Modifications of the Rule.— The doctrine embodied in the general statement that a purchaser of realty takes with notice of every adverse legal claim or outstanding equity disclosed by the recitals contained in any of the papers under or through which he traces his title, is of universal recognition, both in this country and Great Britain, subject, however, to such refinements and modifications as the peculiarities of adjudicated cases have from time to time demanded.[3]

v. Mitchell, 3 Ired. Eq., 535; Mason *v.* Paine, Walk. Ch., 453; Chew *v.* Calvert, Walk., 54; Tanner *v.* Florence, 1 Ch. Cas., 259: Newsom *v.* Clarkson, 2 Hare, 163.

[1] Guion *v.* Knapp, 6 Paige, 35; Kerr *v.* Kitchen, 17 Pa. St., 433; Hackwith *v.* Damron, 1 Mon., 235; Bellas *v.* Lloyd, 2 Watts, 401.

[2] *Ante*, ch. I, pt. I.

[3] Hackwith *v.* Damron, 1 Monr., 235; Neale *v.* Hagthrop, 3 Bland, 551; Hagthrop *v.* Hook, 1 Gill & J., 270; Baker *v.* Mather, 25 Mich., 51; Stidham *v.* Matthews, 29 Ark., 650; Corbitt *v.* Clenny, 52 Ala., 480; Bazemore *v.* Davis, 55 Ga., 504; Jumel *v.* Jumel, 7 Paige, 591: Briggs *v.* Palmer, 20 Barb., 392; Hamilton *v.* Nutt, 34 Conn., 501; Dargin *v.* Beeker, 10 Iowa, 571; Babcock *v.* Lisk, 57 Ill., 327; Pike *v.* Goodnow, 12

§ 311. **Recitals in Original Patent.**— So where the title is derived from the general government by a patent, which contains recitals affecting the title in the hands of a purchaser, however remote from the original patentee, such recitals will affect the purchaser, although he was ignorant both of the recitals and the facts recited when he acquired the title.[1]

§ 312. **Illustration.**— An example of this rule and its application to recitals in the original patent was where the party entitled to a patent devised the property to his son *in tail*, and in the event of his decease without issue, to descend to another son. After the decease of the devisor the devisee obtained a patent to the land, by which it was granted to him in *fee-simple*, reciting that the title was derived under the will of the devisor. The land was conveyed by the patentee in several parcels to different grantees in fee, and in the deeds of bargain and sale he recited the patent under which he held. After the land had passed by successive conveyances to a grantee for value, in a contest between the issue *in tail* and such subsequent purchaser, it was held, though admittedly a hard case, that the purchasers were affected by the recitals in the patent of the extent of the estate devised in the will.[2]

§ 313. **Sufficient if Recitals Would Lead to Knowledge.**— It is not necessary, in order to constitute notice by this means, that the recitals in the antecedent deed or other instrument through which the title is traced shall contain a detailed and explicit reservation of the right or title claimed, in such terms as would dispense with further proof. It will be sufficient if the party cannot make out his title without such

Conn., 472; Sanborn *v.* Robinson, 54 N. H., 239; Brown *v.* Simons, 44 N. H., 475. See Holmes *v.* Ferguson, 1 Or., 220; Graham *v.* Meeks, 1 Or., 325.

[1] Bonner *v.* Ware, 10 Ohio, 465; Brush *v.* Ware, 15 Pet., 93; S. C., 1 M'Lean, 533; Reeder *v.* Barr, 4 Ohio, 446.

[2] Burkart *v.* Bucher, 2 Bin., 455; also Oliver *v.* Piatt, 3 How. (U. S.), 333, 409.

instrument, which by its recitals leads him to the fact of which he is to be charged with notice. The reason alleged for the rule is that the purchaser is entitled to see all the muniments of title, and therefore must be presumed to have seen them, and to have taken notice of all their recitals which in any way affect his purchase, as the omission on his part to take such precautions would amount to gross negligence.[1]

§ 314. **In Same Transaction.**— It is decided, however, in most of the early English cases above cited, that notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. So that, where one is purchasing a particular piece of real estate, and his title deeds recite a charge upon, or equitable interest in, another piece in favor of a third party, such recitals would not affect him with notice of such charge or interest, in the event of his subsequent purchase from the holder of the legal title to the other property. He is not presumed to carry the knowledge thus imputed to him in the first transaction in his memory until the second purchase has been effected.[2]

§ 315. **Should be in Same Chain of Title.**— This application of the doctrine has also received the approbation of

[1] Johnson *v.* Thweatt, 18 Ala., 741; Neale *v.* Hagthrop, 3 Bland, 551 Gordon *v.* Sizer, 39 Miss., 805; Van Doren *v.* Robinson, 1 Green, 256 Rogers *v.* Jones, 8 N. H., 264; Garrett *v.* Puckett, 15 Ind., 485; Ross *v.* Worthington, 11 Minn., 438; Griffith *v.* Griffith, 1 Hoff. Ch., 153; Hamilton *v.* Royse, 2 Sch. & Lef., 315; Mertins *v.* Joliffe, Amb., 311; Taylor *v.* Stibbert, 2 Ves. Jr., 437; Surman *v.* Barlow, 2 Edm., 167; Taylor *v.* Baker, 5 Pri., 306; Moor *v.* Bennett, 2 Ch. Cas., 246; Palmer *v.* Wheeler, 2 B. & B., 31; Roddy *v.* Williams, 3 J. & L., 1; Steadman *v.* Poole, 16 L. J. Ch., 349; Hope *v.* Liddell, 21 Beav., 183; Howard *v.* Chase, 104 Mass., 249.

[2] See Hamilton *v.* Royse, 2 Sch. & Lef., 315, and cases cited.

the American courts, when invoked to charge a purchaser with notice of an antecedent unrecorded instrument, or equitable interest, in cases where the recitals offered in evidence of notice were contained in the title papers to a different piece of property from that to which they referred.[1] In the case cited, Judge Rogers, in delivering the opinion of the court, says in explanation of the reason for the holding: "The evidence would lead to dangerous consequences, for it is impossible for any one to recollect the recitals in deeds under which he may claim. Let this be held to be admissible and competent to affect a subsequent purchaser with notice, it would follow that no man can safely purchase until a most careful examination and inspection of every deed to which he may be a party, and under which he claims."[2]

§ **316. Recitals Reasonably Certain.**— As to the manner in which the fact, of which the purchaser is presumed to take notice, should be referred to in the instrument, nothing more can be said in a general way than that it should be reasonably certain and specific, the recitals containing sufficient information to put a man of reasonable prudence upon inquiry, leading to the truth. Mere vague allusions to something which may or may not amount to an interest in the property will not always suffice.[3]

§ **317. Same.**— The rule as to certainty, however, as deduced from the authorities, can probably be exemplified

[1] Boggs *v.* Varner, 6 Watts & Serg., 469.

[2] *Id.*, 473.

[3] Ridgeway *v.* Holliday, 59 Mo., 444; Boggs *v.* Varner, 6 Watts & Serg., 469; Kaine *v.* Denniston, 22 Pa. St., 202; French *v.* Loyal Co., 5 Leigh, 627; Smith *v.* Denton, 42 Iowa, 48; Watson *v.* Phelps, 40 Iowa, 482; Munn *v.* Best, 62 Mo., 491; Kearney *v.* Vaughan, 50 Mo., 284; May *v.* Le Claire, 11 Wall., 217; Bragg *v.* Paulk, 42 Me., 502; Bertram *v.* Cook, 32 Mich., 518; Edmonds *v.* Torrence, 48 Ala., 38; Stout *v.* Hyatt, 13 Kans., 232; Lewis *v.* Boskins, 27 Ark.. 61; Peay *v.* Capps, 27 Ark., 160; Conover *v.* Van Mater, 18 N. J. Eq., 481; McNary *v.* Southworth, 58 Ill., 473; White *v.* Carpenter, 2 Paige, 217; Bell *v.* Twilight, 22 N. H., 500. But see Chapman *v.* Sims, 53 Miss., 154; Corbin *v.* Sullivan, 47 Ind., 356; Hutchinson *v.* Harttman, 15 Kans., 133.

more satisfactorily by illustration from cases where the uttermost limit of uncertainty has been reached.

§ 318. **Example of General Recital.**—In Bellas *v.* Lloyd,[1] the purchase made was by defendant from the plaintiff and wife, of a lot upon which was situated a church edifice. The deed of conveyance purported to convey to defendant the property in question, "together with all the rights, liberties, privileges, hereditaments and appurtenances, in as full and ample a manner, and with all the same rights and conditions, authorities and agreements, with which the said H. B. (the plaintiff), and E., his wife, now hold the said premises, as regards all or any assemblies for divine worship." This was held sufficient to charge the purchaser with notice of every subsisting agreement by plaintiff with any religious body, for the use of the church for divine worship.

§ 319. **Uncertainty of Description.**—So where the testator, in the will under which the purchaser claimed, devised to his son fifty acres out of the northwest corner of the tract claimed by the purchaser, unless it had been selected elsewhere, and never given up, this was held sufficient to charge the purchaser with notice of the claim of the son to fifty acres, because any person, on reading the will, would be led to inquire whether the devisee had received his fifty acres, and, if so, whether he had selected it elsewhere than in the corner designated. The information contained in the will was sufficient to put the purchaser upon inquiry, because the will was a necessary link in his grantor's title.[2] It will be noticed here that there were several features of uncertainty involved in this devise. It was only to take effect upon the particular portion of the tract described, in the event that it had not been permanently selected elsewhere. There was no time specified for the selection, nor any particular fifty acres designated, and yet as this might have been rendered sufficiently certain to protect a pur-

[1] 2 Watts, 401.

[2] McAteer *v.* McMullen, 2 Pa. St., 82.

chaser who would take the pains to inquire, the court held it sufficient to impose the duty of inquiry upon purchasers under the will, however remote.

§ 320. **Sriking Peculiarities of Recital.**— It has also been decided, where there was a deed of release from one of two partners in business to himself and copartner, in which the consideration was expressed as follows: "One dollar, received of C. S. & C. M., merchants in trade under the firm name of C. & Co.," the land "to be held in such proportion as is agreed on between them," that the striking singularities of this instrument — it being a deed from the releasor to himself and another, and describing the releasees as partners, etc.— were sufficient to put the purchaser upon inquiry as to whether or not it was partnership property.[1]

§ 321. **Recital in Will — In a Lease.**— So where the codicil of a will, through which the title was traced, recited the fact that the plantation and tract of land near to the premises of a Mr. H. was the joint property of the testator and another, the notice was held sufficiently certain, though it did not state whether the land joined that of H. on the north, south, east or west side.[2] There were peculiar circumstances, however, tending to render this description more certain than it appeared on its face; for there was but one piece of property owned by the testator at the time of his decease, in that township, or which answered to the description in the codicil in any other particular. It is also held that, where the title papers recite the fact of the existence of a lease, it takes effect as notice of the covenants therein contained.[3] But the effect of notice of a lease has been confined to the ordinary covenants therein.[4]

[1] Sigourney *v.* Munn, 7 Conn., 324.

[2] Lodge *v.* Simonton, 2 Penn., 439.

[3] Smith *v.* Capron, 7 Hare, 185; Tanner *v.* Florence, 1 Ch. Cas., 259; Drysdale *v.* Mace, 2 Sm. & Gif., 225; Cosser *v.* Collinge, 3 My. & K., 282; Cox *v.* Coventon, 31 Beav., 378; Martin *v.* Cotter, 3 Jones & L., 496; Pope *v.* Garland, 4 Y. & C., 394.

[4] Flight *v.* Barton, 3 My. & K., 283; Vân *v.* Corpe, 2 My. & K., 269; Pope *v.* Garland, 4 Y. & C., 394.

§ 322. **Limitations Upon Effect of Recitals.**— On the other hand, the effect of the recital as notice will be confined to the fact recited, and such other facts as it directly leads to. Thus, where a second mortgage referred to a prior one in which it was recited that "part of the premises above described are subject to a lease and mortgage to D. F. & Co., and a mortgage to S. F., B. F. and H. F., as by reference to the records will more fully appear," it was held that this would only amount to notice of the conveyances described, and if there were none such, would not be notice of an unregistered conveyance to D. F. and wife.[1]

§ 323. **Recital of a Trust.**— It was likewise held, in a case where there was a recital in a deed made for a consideration merely nominal, that it was made in fulfillment of a trust reposed in the grantor by the grantee, did not amount to notice of any other trust than one in favor of the grantee.[2]

§ 324. **May be by Variety of Instruments.**— Notice may be brought home to a subsequent purchaser by the recitals in a great variety of instruments. As we have seen, it may be by the contents of a will, where the title to the property has been passed to the grantor by devise.[3] So where a testator devised a farm to his son, and gave to his two daughters a legacy of $1,000 each, to be paid by the son, whom he made residuary legatee, the farm was held in equity to be charged with the payment of the legacies, unless there was something in the will to rebut the presumption that the testator intended so to charge the estate devised. And a subsequent purchaser from the devisee or his grantee, being compelled to trace his title through the will, was held affected with notice of the legacies and to

[1] Bell *v.* Twilight, 22 N. H., 500, 521; Burch *v.* Carter, 44 Ala., 115; Mueller *v.* Engeln, 12 Bush., 441; Boggs *v.* Varner, 6 Watts & S., 469; Sleeper *v.* Chapman, 121 Mass., 404. See, also, Champlin *v.* Laytin, 6 Paige, 189.

[2] Kaine *v.* Denniston, 22 Pa. St., 202; Rafferty *v.* Mallory, 3 Biss., 362; Coy *v.* Coy, 15 Minn., 119.

[3] McAteer *v.* McMullen, 2 Pa. St., 32; Lodge *v.* Simonton, 2 Penn., 439.

take the real estate subject to the charge.[1] And where an instrument in the chain of title makes mention of a collateral instrument, the purchaser would be affected with notice of the recital in such collateral instrument, and all facts that might be ascertained by due inquiry in the line indicated by such recital.[2] This extends the effect of notice from title papers to facts somewhat remote. The fact recited in the chain of title is merely the existence of an instrument which is not essential to the passing of title from the prior party to the immediate grantor of the purchaser. Such an instrument may or may not affect the title by showing an outstanding claim. If it contains any such disclosure, or facts which would upon inquiry lead to such disclosure, the purchaser is charged with notice.[3]

§ 325. **Recitals in Mortgages.**— It is well settled that the rule applies to recitals in mortgages of prior date to the purchase, subject only to the provision that such incumbrances occur in the chain of title from the original holder down to the purchaser affected by the recital. So that, where the title to a piece of land was acquired at a foreclosure sale of a mortgage, made to secure two notes of the same date, neither of which had priority over the other, but which were due to different payees, and the suit for foreclosure was brought by one of such payees, without making the other a party, the recitals in the mortgage were held sufficient notice to the purchaser of the lien in favor of the holder of the other note.[4]

§ 326. **Books of Record.**— So, books and records necessary to make out the grantor's title have been held to affect with notice, by their contents, a grantee who may be ignorant of the facts therein recited. Thus, where the purchase was made at a sale under an execution against the original enterer of the land, it was held, as he could only make out

[1] Harris *v.* Fly, 7 Paige, 421.
[2] Judson *v.* Dada, 79 N. Y., 373.
[3] Hope *v.* Liddel, 21 Beav., 183.
[4] Burrus *v.* Boulhac, 2 Bush, 39.

his title by reference to the books in the land office which show the original entry, that he was affected with notice of an assignment entered there prior to the rendition of the judgment upon which the execution was based.[1]

§ 327. **Conveyance by Statute.**— The manner of transferring the title of a judgment debtor, by execution sale, and the deed made in pursuance thereof, has been aptly denominated a "conveyance by statute."[2] Its constituent parts are said to consist of the judgment, the levy, and the sheriff's deed, each of which is an essential requisite to a perfect conveyance. Upon the validity of each of these constituents must the purchaser depend to effectuate a transfer of the interest of the judgment debtor, and the absence of either would render the conveyance inoperative for the purpose of vesting such interest in the purchaser. The record of these facts is regarded as the written evidence of title, answering in the place of a voluntary deed of conveyance, and as such necessary to enable the subsequent purchaser to make out his title.[3] The record of the judgment and decree forming part of the conveyance under which the property was claimed in this case, when looked into, disclosed that the plaintiff was not a party to the suit at which the former judgment was rendered; that he was at that time an infant of tender years; that he was the son and heir of A. N., deceased; that one H. caused himself to be appointed, in Tennessee, administrator of the estate of A. N., who up to the time of his death resided in Georgia; that H., in his capacity of such administrator, and also in the character of a creditor under color of such authority as was conferred by statute, instituted his suit to subject the real estate of the heir in Tennessee to the payment of the debts of his ancestor, prosecuted his suit to judgment, and obtained a decree ordering a sale of the real estate. At the sale the administrator became the purchaser of a tract of

[1] Martin *v.* Nash, 31 Miss., 324.
[2] Nelson *v.* Allen, 1 Yerg. (Tenn.), 360.
[3] *Ibid.*

six hundred and forty acres of land for the price and sum of $25. For the reason that the record of the judgment, where these facts were either disclosed by recitals or direct reference to other papers, was a necessary link in the chain of title to the property, it was held that a purchaser would be affected with notice of such facts.[1]

§ 328. Facts Which May be thus Brought Home to Purchaser.— The facts which may be brought to the knowledge of the purchaser in this manner are not confined to such as disclose an outstanding legal title to the premises which may have escaped attention by reason of a failure to comply with the registry laws. So where a prior deed, under which the purchaser holds, shows upon its face that it is fraudulent, he will be charged with notice of such fraud.[2]

§ 329. Contract to Convey.— The rule also applies with equal force where the fact to be brought home to the purchaser is a contract to convey, which merely raises an equity in favor of the covenantee, and where such fact is buried in the contract, the existence of which is only made known by the title paper. As where the contest lay between two parties, one of whom (the plaintiff) had a contract for a mortgage which was to be a second lien upon the premises, but which had been fraudulently withheld by the other contracting party, and the defendant who had taken a mortgage upon the same premises, given in violation of the terms of the contract. The deed to the mortgagor recited that it was made in pursuance of a contract of sale between the grantor and the plaintiff, of which the grantee had become the assignee or purchaser, and as such, entitled to a fulfillment thereof, by virtue of this conveyance,— giving the date of said contract. In making the assignment of his con-

[1] Nelson *v.* Allen, 1 Yerg., 360.

[2] Johnson *v.* Thweatt, 18 Ala., 741; Steedman *v.* Poole, 6 Hare, 193; Sergeant *v.* Ingersoll, 15 Pa. St., 343; Coy *v.* Coy, 15 Minn., 119; Dudley *v.* Witter, 46 Ala., 664; Campbell *v.* Roach, 45 Ala., 667; Newsome *v.* Collins, 43 Ala., 656.

tract mentioned in the deed, plaintiff and the mortgagor entered into a written agreement, by which the latter agreed, as part of the consideration of such assignment, that he would execute to plaintiff a mortgage for a stipulated sum, which should be a lien prior to all others, except the one mentioned therein. It was not questioned that the mortgagee, who was made a party defendant with the mortgagor, by the recitals in the deed to his grantor was affected with notice of the contract of sale therein referred to; but this was not sufficient, for of itself it would not disclose plaintiff's equity. It was, however, sufficient to charge the mortgagee with notice that the title had passed through the plaintiff's hands, by means of such contract and the assignment thereof to his co-defendant, the mortgagor. This rendered the assignment a necessary link in the chain of title, and although it was purely equitable in its nature, would be binding upon all purchasers with notice.[1]

§ **330. Vendor's Lien.**— The vendor's lien for the purchase money is another equitable interest which will be protected as well by notice through the paper evidences of title as otherwise. So where the property purchased had previously been sold on a credit, which fact appeared by the recitals in one or more of the deeds, this was held sufficient notice to put the purchaser upon inquiry as to whether the same had ever been paid, and failing to make such inquiry the land would be charged in his hands with the original lien for the purchase money.[2] But where a sufficient time had elapsed to bar a claim for the purchase money, under the statute of limitations, it was held that the purchaser might assume that it had been paid.[3]

§ **331. Who Affected.**— The notice derived from title papers will affect not only those who may be classed as subsequent purchasers. It has been held binding upon prior

[1] Acer *v.* Westcott, 1 Lans., 193; S. C., 46 N. Y., 384.

[2] Honore's Ex'r *v.* Bakewell, 6 B. Mon., 67; Thornton *v.* Knox, id., 74; Deason *v.* Taylor, 53 Miss., 697; Montefiore *v.* Browne, 7 H. L., 241.

[3] Avent *v.* McCorkle, 45 Miss., 221.

parties as well. Where a portion of the real estate included in a mortgage has been aliened by the mortgagor, by deed of general warranty, equity will require the mortgagee to proceed against the property for satisfaction of his mortgage debt, in the inverse order of its alienation. And when he has released a portion of the premises from the incumbrance, with knowledge or notice of the prior alienation of another portion, he will not be permitted to foreclose against that portion previously aliened, except upon condition that he credits the debt with the value of the property by him released. Such notice has been implied from the recitals in a release given under such circumstances, making mention of the assignment by the releasee, as further security, of a bond and mortgage given by the alienee of the portion previously conveyed. The fact that an instrument executed by himself, affecting the title to the property, acknowledged the assignment of a security taken for the purchase price of a portion of the land included in his mortgage, was held to be a conclusive presumption that he knew when he executed that instrument that the property incumbered by such security had been aliened by the mortgagor.[1]

§ 332. **Different Kinds of Property.**— It has been stated elsewhere that this doctrine is most frequently applied to cases involving the title to real property.[2] This, however, is only incidental to the difference in the manner and mode of transferring the title to property of a permanent nature from that employed to convey that which is movable. There is no difference in principle between the effect of recitals in papers by which the title to real estate and personal property is transmitted, when the latter is conveyed or affected by written instruments. This is generally either where the title is acquired under a will, or a chattel mortgage or trust deed.

[1] Guion *v.* Knapp, 6 Paige, 35.
[2] *Ante*, § 307.

§ **333. Stocks Transferred by Executor.**—The principle here discussed was applied in an early English case, where the property involved was certain stocks, which were assigned by an executor to a broker, who took the same in satisfaction of a debt due from such executor. Knowledge of the fact that the stocks were received by the executor from the testatrix was brought home to the assignees of the stocks, but not that he had actual notice or knowledge of the contents of the will. It was nevertheless held by the master of the rolls, that, as he could not make out his title independent of the will, he was put upon inquiry as to its contents. And, had he inquired, he would have discovered the falsity of the representations made to him by the executor with respect to his right to assign the stocks.[1]

§ **334. Personal Property.**—So where personal property of great value was conveyed in trust to secure a trifling indebtedness, conditioned that the property thus transferred might remain in the possession of the grantor for an indefinite time, he having the right to use and consume the same according to his own pleasure, until the happening of an uncertain event. The property thus conveyed included debts due the grantor as well as chattels in possession, and according to the construction placed upon the terms of the instrument, the grantor was allowed to collect these debts without being required to account to the trustee for the money so collected. It was held that this deed bore upon its face such unmistakable evidence of its fraudulent character, that any one reading it must be presumed to know that it was a contrivance to hinder and defraud creditors. And that a purchaser whose title to the property was traced through this deed was affected with notice of all of its provisions.[2]

§ **335. Inquiry Extends to Examination of Papers.**—The rules will apply to any species of property which may be legally transferred by written instruments, or where the

[1] Hill *v.* Simpson, 7 Ves. Jr., 152.

[2] Johnson *v.* Thweatt, 18 Ala., 741–7.

title depends upon any writing. And it has been held that the inquiries which the purchaser is under obligation to make by reason of his knowledge of the existence of such writing must not stop short of an inspection of the documents themselves.[1]

§ 336. **Deed of Real Estate Containing Bill of Chattels.**— But where a conveyance of real estate in which was incorporated a bill of sale of chattels had been placed upon record, it was held that a purchaser of the real estate was not thereby charged with notice of a lien attempted to be retained upon the personalty.[2]

[1] Christmas *v.* Mitchell, 3 Ired. Eq., 535.
[2] Mueller *v.* Engeln, 12 Bush (Ky.), 441.

CHAPTER VI.

LIS PENDENS.

§ 337. Lord Bacon's Rule.
338. Public Policy.
339. Doctrine of Constructive Notice Applied.
340. Views of Judge Story.
341. Chancellor Kent.
342. Rule of Equity Jurisprudence.
342*a*. Actions in Which the Doctrine Has Been Applied.
343. Applied to Action of Ejectment.
344. The Doctrine Indispensable.
345. Lord Hardwicke.
346. Effect of Revivor.
347. Consideration No Protection to Purchaser.
348. Commencement of the Suit.
349. Service of Process.
350. Harshness of the Rule.
351. Property to be Identified.
352. Alimony.
353. Creditors' Bill.
354. Jurisdiction.
355. Holder of Legal Title Must be Impleaded.
356. Equitable Interest Between Defendants Unaffected.
357. Suit Must be Continuously Prosecuted.
358. Effect of Dismissal.
359. Diligence in Prosecution.
360. Rule Not Extended to Affect Others than Purchasers.
361. Prior Mortgagee Unaffected.
362. Foreclosure of Prior Mortgage.
363. Antecedent Equity.
364. Same.
365. Holder of Equity May Acquire Legal Title.
366. Holder of Contingent Right.
367. Waiver by Plaintiff.
368. Grantor Must be a Party at Time of Purchase.
369. Generally Confined to Real Estate.
370. Purchaser of Securities.
371. Same — Illustration — Trusts.
372. Does Not Affect Negotiable Paper.

§ 373. Peculiar Kind of Property.
374. Statutory Provisions.
375. Purchaser Not Affected Personally — Effect of Judgment.
376. Statute of Limitations Does Not Run During Suit.
377. Purchaser at Execution Sale.

§ 337. Lord Bacon's Rule.— The rule by which a purchaser of property, *pendente lite*, is bound by the decree of the court, is thus expressed by Lord Bacon: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of court, there regularly the decree bindeth. But if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matters according to justice."[1]

§ 338. Public Policy.— The language of the courts in describing the operation of this rule as *constructive notice* has not escaped learned criticism. Lord Cranworth, in Bellamy *v.* Sabine,[2] regards it as "scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice. . . . It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party." It has also been held that, as the doctrine operates in cases where there is no possibility of the purchaser having notice of the pendency of the suit, therefore it rests upon considerations of public policy, and not upon any presumption of notice.[3]

§ 339. Doctrine of Constructive Notice Applied.— It is undoubtedly true that the rule, which at times works harshly,

[1] Bacon's Works, vol. 2, 479.

[2] 1 De G. & J., 566-78; Culpepper *v.* Aston, 12 Ch. Cas., 115; Sorrell *v.* Carpenter, 2 P. Wms., 482; Garth *v.* Ward, 2 Atk., 174; Worsley *v.* Earl of Scarborough, 3 id., 392.

[3] Newman *v.* Chapman, 2 Rand., 93.

is only justified by the necessity there exists of putting an end to litigation and preventing the defendant from evading the decree by parting with the property in dispute after the suit is instituted, and before it has reached final judgment or decree. But courts of equity would not tolerate a rule merely upon grounds of necessity, which operated to divest the title to property acquired not only in good faith, but without any means whatever of gaining a knowledge of adverse claims. It is no explanation of the principle upon which the rule is founded to say that "the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." The rule does not operate simply to prohibit litigant parties from transferring their interests. It also prevents others from purchasing while the title is being litigated. It could hardly be conceived that a court of equitable jurisdiction would entertain a rule so harsh in its operations were it not for the publicity of judicial proceedings, by which the purchaser *might* be enabled to gain a knowledge of the manner in which his vendor's title was attacked. It is perfectly safe to say that if the proceedings were conducted with such secrecy as to render it utterly impossible for a purchaser to obtain any information of the controversy before it was too late, the doctrine of *lis pendens* never would have been promulgated. There is then no impropriety apparent from the reason of the rule, in declaring that the pendency of a suit respecting the title to real property is such notice to the world that the property which is the subject of the litigation will be bound by the decree in the hands of a purchaser actually ignorant of the litigation.[1]

[1] Blanchard *v.* Ware, 43 Ia., 530; Borrowscale *v.* Tuttle, 5 Allen, 377; Havens *v.* Adams, 8 Allen, 363; McPherson *v.* Housel, 2 Beasley, 299; Hersey *v.* Turbett, 27 Pa. St., 418; Boulden *v.* Lanahan, 29 Md., 200; Inloes' Lessee *v.* Harvey, 11 Md., 519; Tongue *v.* Morton, 6 Har. & J., 21; Real Estate Sav. Inst. *v.* Collonious, 63 Mo., 290; O'Reilly *v.* Nicholson, 45 Mo., 160; Holman *v.* Patterson's Heirs, 29 Ark., 357; Brundage *v.* Biggs, 25 Ohio St., 652; Seabrook *v.* Brady, 47 Ga., 650; Douglass *v.* McCrackin, 52 Ga., 596; Tharpe *v.* Dunlap, 4 Heisk., 674.

§ 340. **Views of Judge Story.**— This view of the question is also well supported by authority. Judge STORY has said that "every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And therefore a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit."[1]

§ 341. **Chancellor Kent.**— So, in the leading American case of Murray *v.* Ballou,[2] Chancellor KENT declares that "a *lis pendens* duly prosecuted, and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree."

§ 342. **Rule of Equity Jurisprudence.**— This doctrine has been generally accepted in courts of equity in this country and Great Britain, and the rule as declared above, except where abrogated or modified by statute, continues to form a part of the equity jurisprudence of both countries. It has been held that this is purely a doctrine of equity, recognized and enforced in courts of equity alone, and cannot be rendered available in proceedings at law.[3]

§ 342a. **Actions in Which the Doctrine Has Been Applied.**— Among the actions to which this doctrine will apply are suits for the foreclosure of unrecorded mortgages;[4] to

[1] Story's Eq. Jur., sec. 405.

[2] 1 Johns. Ch., 566. See, also, Edwards *v.* Banksmith, 35 Ga., 213; Harris *v.* Carter, 3 Stew., 233; Murray *v.* Finster, 2 Johns. Ch., 155; Heatley *v.* Finster, id., 158; Green *v.* Slayter, 4 Johns. Ch., 38; Salisbury *v.* Morse, 7 Lans., 359; Cook *v.* Mancius, 5 Johns. Ch., 89; Sedgwick *v.* Cleveland, 7 Paige, 287; Van Hook *v.* Throckmorton, 8 Paige, 33; White *v.* Carpenter, 2 Paige, 217; Jackson *v.* Losee, 4 Sandf. Ch., 381; Jackson *v.* Andrews, 7 Wend., 152; Leitch *v.* Wells, 48 Barb., 637; 48 N. Y., 585; Chapman *v.* West, 17 N. Y., 125; Ayrault *v.* Murphy, 54 N. Y., 203; Harrington *v.* Slade, 22 Barb., 161; Pratt *v.* Hoag, 5 Duer, 631.

[3] King *v.* Bill, 28 Conn., 593.

[4] Chapman *v.* West, 17 N. Y., 125; Center *v.* Bank, 22 Ala., 743; McCutchen *v.* Miller, 31 Miss., 65.

foreclose vendors' liens;[1] to set aside a decree of partition;[2] to enforce the specific performance of contracts for the sale of real estate;[3] to enforce a charge against real property, whatever be the form of action;[4] or in almost any suit brought for the purpose of determining the title to real property, where the record of the instruments under which title is claimed is not sufficient to give notice to subsequent purchasers.[5] Actions in the nature of creditors' bills have been considered as giving notice to subsequent purchasers of the particular property involved in the controversy, of the equitable lien claimed. But to have this effect, it must be so definitely described that there can be no question as to the property intended.[6]

§ **343. Applies to Action of Ejectment.**— It has also been repeatedly decided, that where an action of ejectment is instituted against the tenant in possession, one coming into possession of the subject of litigation, by assignment or otherwise, *pendente lite*, will be bound by the judgment, although he be not made a party defendant, and may be ejected under the judgment against his assignor.[7] Such assignee of the possession would be liable for mesne profits, and could not set up title in himself in bar to the action therefor.[8] The application of the doctrine, however, is con-

[1] Center *v.* The Bank, 22 Ala., 743.

[2] Real Est. Sav. Inst. *v.* Collonious, 63 Mo., 290.

[3] Blanchard *v.* Ware, 43 Iowa, 530.

[4] Seabrook *v.* Brady, 47 Ga., 650.

[5] Tharpe *v.* Dunlap, 4 Heisk., 674; Cockrill *v.* Maney, 2 Tenn. Ch., 49; Wickliffe *v.* Breckenridge, 1 Bush, 427; Hersey *v.* Turbett, 27 Pa. St., 418.

[6] See McDermott *v.* Strong, 4 Johns. Ch., 687; Weed *v.* Pierce, 9 Cow., 722; Hadden *v.* Spader, 20 Johns., 554; Edmeston *v.* Lyde, 1 Paige, 637; Farnham *v.* Campbell, 10 Paige, 598; Corning *v.* Whyte, 2 Paige, 567; U. S. Bank *v.* Burke, 4 Blackf., 141; Blake *v.* Bigelow, 5 Ga., 437.

[7] Howard *v.* Kennedy, 4 Ala., 592; Jackson *v.* Tuttle, 9 Cow., 233; Jones *v.* Chiles, 2 Dana, 25; Smith *v.* Trabue, 1 McLean, 87; Wallen *v.* Huff, 3 Sneed, 82; Hickman *v.* Dale, 7 Yerg., 149.

[8] Jackson *v.* Stone, 13 Johns., 447; Bradley *v.* McDaniel, 3 Jones, 128; Fogarty *v.* Sparks, 22 Cal., 142; Bollin *v.* Connelly, 73 Pa. St., 336; Hill *v.* Oliphant, 41 Pa. St., 364.

fined to proceedings in courts of general or superior jurisdiction. It does not apply to proceedings before a board of supervisors, for the condemnation of land for public purposes or the like.[1]

§ 344. **The Doctrine Indispensable.**— The harshness of this rule as applied to cases of equitable cognizance, though frequently acknowledged by learned chancellors, has not served to deter them from adhering to it as a safe doctrine, and one which seemed indispensable to the enforcement of their decrees. To hold that purchasers of property, the title to which was in litigation at the time of the transfer, should be unaffected by the decree unless brought in as parties to the suit after the purchase, would be to place it within the power of a defendant holding under a colorable title, to prolong the litigation indefinitely. The case of Martin *v.* Stiles[2] fairly illustrates the extent to which the courts have gone in supporting the principle involved in Lord Bacon's rule. There the bill was filed and process served in the year 1640, and the case abated by the death of one of the parties about eight years thereafter; the purchase was made about three years after the abatement, and the case was revived about eleven years subsequent to the purchase, and the decree one year thereafter; being twenty-three years subsequent to the institution of the suit, fifteen years subsequent to the abatement, and twelve years after the purchase. It was nevertheless held that the apparent *laches* in the prosecution of the suit was excused by the wars prevalent at the time, and that the purchase while the suit was in abeyance was made *pendente lite*, and that the purchaser was consequently bound by the decree.[3]

[1] Curran *v.* Shattuck, 24 Cal., 427.

[2] Cited in Bishop of Winchester *v.* Paine, 11 Ves. Ch., 194; S. C., 1 Ch. Ca., 150.

[3] The doctrine was applied where there was a purchase from the successful party in a partition suit, after appeal, and before the suit was finally determined. The cause was remanded, and the mandate of the supreme court had not reached the trial court. Real Est. Sav. Inst. *v.* Collonious, 63 Mo., 290; Jackson *v.* Warren, 32 Ill., 331; Gilman *v.* Ham-

§ 345. **Lord Hardwicke.**— In Garth *v.* Ward,[1] Lord Hardwicke, in pronouncing the opinion, says: "A decree dismissing a bill of redemption would operate equally in favor of the mortgagee against any person to whom the mortgagors should, during the pendency of that suit, convey, as against himself. . . . So, in the case of a mortgagor who comes here for redemption, if, during such suit, he should assign the equity of redemption, and in the final hearing of the cause there should be a decree against the mortgagor, will not the assignee of the equity of redemption be bound by this decree?"

§ 346. **Effect of Revivor.**— So, also, where a suit was instituted to foreclose a mortgage, and during its pendency the mortgagor executed a second mortgage upon the same premises and died prior to the decree, on reviving the suit against his personal representatives it was held unnecessary to make parties of mortgagees or purchasers who became such after the institution of the suit.[2]

§ 347. **Consideration No Protection to Purchaser.**— Where the doctrine is in force independent of any statutory provision, the purchaser *pendente lite* will not be protected because he paid a valuable consideration and purchased without actual notice of the pendency of the suit; but the subject of litigation will be affected by the decree to the same extent as though the purchase were made with full knowledge of the pendency of the action.[3]

§ 348. **Commencement of the Suit.**— In determining whether a purchase of property is made during the pend-

ilton, 16 Ill., 225; Kern *v.* Hazerigg, 11 Ind., 443; Truitt *v.* Truitt, 38 Ind., 16; Knowles *v.* Rablin, 20 Ia., 101; Loomis *v.* Riley, 24 Ill., 307; Cooley *v.* Brayton, 16 Ill., 10; Preston *v.* Tubbin, 1 Vern., 286; Higgins *v.* Shaw, 2 Dr. & War., 356.

[1] 2 Atk., 174–5.

[2] Bishop of Winchester *v.* Paine, 11 Ves. Ch., 194; Montgomery *v.* Birge, 31 Ark., 491.

[3] Norton *v.* Birge, 35 Conn., 250; King *v.* Bill, 28 id., 598; Ray *v.* Roe, 2 Blackf., 258; Green *v.* White, 7 Blackf., 242; Ferrier *v.* Buzick, 6 Ia., 258.

ency of a suit affecting the title thereof, an important matter for consideration is what amounts to the *commencement* of a suit.[1] It is necessary to decide this in order to be able to determine whether at the date of the purchase, there was a *lis pendens* within the meaning of the equitable rule. For the purpose of ascertaining whether the suit is brought within the period of statutory limitation, and perhaps for some other purposes, the suit has been held commenced from the date of the issuance of the original process,[2] and as between the parties to the suit, or their personal representatives, from the suing out of process, whether the same be issued and served or not.[3] But in cases generally, and especially in those where the question as to the validity of a purchase depends upon whether the property purchased is the subject of litigation at the time, the suit will not be regarded as pending until the service of original process, whether the same is served personally upon the defendant, or by any method prescribed by statute as a substitute for personal service.[4] And when, for the service of summons,

[1] Sorrell *v.* Carpenter, 2 P. Wms., 482; Worsley *v.* Earl of Scarboro, 3 Atk., 392; Walker *v.* Smallwood, Amb., 676; Lowther *v.* Carlton, 2 Atk., 242; Self *v.* Maddox, 1 Vern., 459; Finch *v.* Newham, 2 id., 216; Wickliffe *v.* Breckenridge, 1 Bush (Ky.), 427; Metcalf *v.* Pulvertoft, 2 Ves. & Beam., 200.

[2] Pindell *v.* Maydwell, 7 B. Monr., 314; Sharp *v.* Maguire, 19 Cal., 577; State Bank *v.* Cason, 10 Ark., 479; State Bank *v.* Brown, 12 Ark., 94; Shaw *v.* Padley, 64 Mo., 519.

[3] McLaren *v.* Thurman, 8 Ark., 313; Maddox *v.* Humphries, 30 Tex., 494; Lyle *v.* Bradford, 7 Mon., 111.

[4] Clark *v.* Helms, 1 Root (Conn.), 486; Dunn *v.* Games, 1 McLean, 321; Games *v.* Stiles, 14 Pet., 322; Clevinger *v.* Hill, 4 Bibb, 498; Chaudron *v.* Magee, 8 Ala., 570; Hopkins *v.* McLaren, 4 Cow., 667; Meux *v.* Anthony, 11 Ark., 411; Downer *v.* Garland, 21 Vt., 362; Gates *v.* Bushnell, 9 Conn., 530; Goodwin *v.* McGehee, 15 Ala., 232; Lyle *v.* Bradford, 7 Mon., 111; Lytle *v.* Pope, 11 B. Mon., 297; Lee *v.* Averell, 1 Sandf., 731; Spalding *v.* Butts, 6 Conn., 28; Sidwell *v.* Worthington, 8 Dana, 74; Jencks *v.* Phelps, 4 Conn., 149; Bacon *v.* Gardner, 23 Miss., 60; Fowler *v.* Byrd, Hemst., 213; Metcalf *v.* Smith, 40 Mo., 572; Samuels *v.* Shelton, 48 Mo., 444; Bailey *v.* McGinniss, 57 Mo., 362; Shaw *v.* Padley, 64 Mo., 519; Allen *v.* Poole, 54 Miss., 323; Allen *v.* Mandville, 26 Miss., 397;

or subpœna in chancery, there is substituted the publication of a notice as ordered by the court, such publication should be complete, before the suit could be regarded as pending so as to affect with notice, a purchaser without actual notice or knowledge of the claim adverse to his vendor.[1]

§ 349. **Service of Process.**— The strictness with which the courts insist upon service of process as the commencement of the suit may be illustrated by the case of Miller *v.* Kershaw.[2] This was a chancery suit, and it was held that the acceptance of service of the subpœna, as of a date prior to that upon which it was actually served, would not make such a *lis pendens* before the day of actual service.[3]

§ 350. **Harshness of the Rule.**— Although this is peculiarly a doctrine of equitable origin, it is by no means one which is a favorite with the courts exercising chancery jurisdiction. The harshness of its operation when applied to cases where the subject of litigation has been purchased in good faith, without actual notice of the pendency of the suit, renders it necessary and proper to confine it within narrow limits and give the innocent purchaser the benefit of all technical objections which may be interposed to the regularity of the proceeding by which his vendor's title is attacked. The enforcement of the rule does not proceed upon the ground that the purchaser has been guilty of *fraud*. It is at most a general notice of an equity, and cannot affect any particular person with a fraud, unless there was a special notice of the title in dispute brought home to the person to be charged with notice.[4]

Farmers' Nat. Bank *v.* Fletcher, 44 Ia., 252; King *v.* Bill, 28 Conn., 592; Dresser *v.* Wood, 15 Kan., 344; Haughwout *v.* Murphy, 21 N. J. Eq., 118; Weeks *v.* Tomes, 16 Hun, 349.

[1] Bennett *v.* Williams, 5 Ohio, 461; Clevinger *v.* Hill, 4 Bibb, 498.

[2] 1 Bailey's Eq., 479.

[3] But a mere irregularity in service, where it appeared that defendant appeared, would suffice as against one who came in by marriage of defendant *pendente lite*. Koehler *v.* Bernicker, 63 Mo., 368.

[4] Mead *v.* Lord Orrery, 3 Atk., 235. See, also, Hayden *v.* Bucklin, 9 Paige, 512.

§ 351. **Property to be Identified.**— One of the leading principles upon which this doctrine is founded is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril. There must, therefore, be something in the pleadings, or the published notice, at the date of the purchase, to direct the purchaser's attention to the property as the *identical thing* which is the subject of the litigation.[1] The notice, being purely constructive, is of the facts contained in the bill and nothing more. Therefore, unless it contains averments calculated to affect the title to the property, the purchaser will be unaffected.[2] Nevertheless, there may be peculiar circumstances that extend the effect of the notice to a portion of the premises not directly embraced in the objects of the suits.[3]

§ 352. **Alimony.**— Where a petition for divorce, in general terms prayed for alimony, without asking for an allowance out of any specific property, this was held not to operate as a lien until the decree was pronounced fastening it upon a particular property.[4]

§ 353. **Creditors' Bill.**— So also, a creditors' bill, to operate as notice under this doctrine, must be so definite in the description of the property to be charged, that any one reading it can learn thereby what property is the subject of the litigation.[5]

[1] Lewis *v.* Mew, 1 Strob. Eq., 180.

[2] Griffith *v.* Griffith, 1 Hoff. Ch. R., 153; Stone *v.* Connelly, 1 Metc. (Ky.), 652; Ray *v.* Roe, 2 Blackf., 258; Miller *v.* Sherry, 2 Wall., 237; Green *v.* Slayter, 4 Johns. Ch., 38; Low *v.* Pratt, 53 Ill., 438; Jones *v.* McNarrin, 68 Me., 334; Lewis *v.* Madison, 1 Munf., 303; Brown *v.* Goodwin, 75 N. Y., 409; Jaffray *v.* Brown, 17 Hun, 575; Chapman *v.* West, 17 N. Y., 125.

[3] Drake *v.* Crowell, 40 N. J. L., 58.

[4] Hamlin *v.* Bevans, 7 Ohio, 161.

[5] Miller *v.* Sherry, 2 Wall., 237; McDermott *v.* Strong, 4 Johns. Ch., 687; Hadden *v.* Spader, 20 Johns., 554; Weed *v.* Pierce, 9 Cow., 722; Edmeston *v.* Lyde, 1 Paige, 637; Corning *v.* Whyte, 2 id., 567; Farnham *v.* Campbell, 10 id., 598; U. S. Bank *v.* Burke, 4 Blackf., 141; Blake *v.* Bigelow, 5 Ga., 437; McCutchen *v.* Miller, 31 Miss., 65.

§ 354. Jurisdiction.— In order that the purchaser *pendente lite* may be charged with constructive notice of plaintiff's equity, by reason of the pendency of the suit, it is necessary that the court to which the summons or subpœna is returnable should have complete jurisdiction of the property in dispute.[1]

§ 355. Holder of Legal Title Must be Impleaded.— It is not sufficient that there is a claim made by the pleadings to the property. To affect a purchaser who comes in *pendente lite*, under the holder of the legal title, with constructive notice of the equity claimed against it, the holder of the legal title must have been impleaded at the time of the purchase. Should he be brought in subsequent to the purchase, the *lis pendens* would not take effect by relation, so as to charge the purchaser with notice, although the property may have been specially designated in the bill.[2]

§ 356. Equitable Interest Between Defendants Unaffected.— The principle of the rule does not extend to the equitable interest of one of the defendants in an action, as against his co-defendant, although such interest be apparent on the face of the proceedings, where it is not necessary for the purposes of the suit that effect be given to such equitable interest, and the purchaser from the defendant in whom the legal title was vested had no notice of such equity.[3]

§ 357. Suit Must be Continuously Prosecuted.— A further restriction upon the application of this doctrine is that, in order to render the pendency of the suit *constructive* notice to *bona fide* purchasers for value and without *actual notice*, the suit must be continuously prosecuted from its commencement to final judgment or decree.[4] And

[1] Carrington *v.* Brent, 1 McL., 167; S. C., 9 Pet., 86.

[2] Carr *v.* Callaghan, 3 Littell, 365; Macy *v.* Fenwick, 9 Dana, 198.

[3] Bellamy *v.* Sabine, 1 De G. & J., 566.

[4] Ferrier *v.* Buzick, 6 Ia., 258; McGregor *v.* McGregor, 21 Ia., 441; Newman *v.* Chapman, 2 Rand., 93; Watson *v.* Wilson, 2 Dana, 406; Herrington *v.* Herrington, 27 Mo., 560; Carter *v.* Mills, 30 Mo., 432; Hayden *v.* Bucklin, 9 Paige, 512; Clevinger *v.* Hill, 4 Bibb, 498; Turner *v.*

where a proceeding was perpetuated by successive continuances from 1842 to 1868, it was justly held that the *lis pendens* had lost its force.[1]

§ 358. **Effect of Dismissal.**— In Ludlow *v.* Kidd,[2] where the suit had been dismissed and a bill of review subsequently filed, it was held that the suit was not pending, within the meaning of the rule, between the time of dismissal and the filing of the bill of review so as to affect purchasers with notice. It was held the same where, after dismissal, a writ of error upon the judgment of dismissal was sued out, and the purchaser between the dismissal and suing out the writ was protected in his purchase.[3]

§ 359. **Diligence in Prosecution.**— To entitle a party plaintiff to the enforcement of this principle of *lis pendens* against a *bona fide* purchaser without actual notice of the litigation, such party will be required to show reasonable diligence in the prosecution of his suit. Accordingly, where it appeared that there had been a failure on the part of the plaintiff to make proper parties, whereby the litigation was unreasonably and vexatiously protracted, the purchaser *pendente lite* was held not to be charged with constructive notice of the suit.[4] But where the suit abates by the death of a party the *lis pendens* will not fail if it be revived without unreasonable delay.[5] Where the appeal is taken by plaintiff it must be diligently prosecuted.[6]

Crebill, 1 Ohio, 372; Lee Co. *v.* Rogers, 7 Wall., 181; Jackson *v.* Warren, 32 Ill., 331; Winborn *v.* Garrell, 3 Ired. Eq., 117; Page *v.* Waring, 76 N. Y., 463; Price *v.* McDonald, 1 Md., 403; Herrington *v.* McCullum, 73 Ill., 476; Petree *v.* Bell, 2 Bush, 58; Trimble *v.* Boothy, 14 Ohio, 109.

[1] Fox *v.* Reeder, 28 Ohio St., 181.

[2] 3 Ohio, 541. But the suit may be regarded as pending continuously, notwithstanding the filing of a supplemental bill prior to the decree. Stoddard *v.* Myers, 8 Ohio, 203.

[3] Eldridge *v.* Walker, 80 Ill., 270.

[4] *Supra*, § 357: Ashley *v.* Cunningham, 16 Ark., 168; Debell *v.* Foxworthy, 9 B. Mon., 228.

[5] Debell *v.* Foxworthy, 9 B. Mon., 228.

[6] Gilman *v.* Hamilton, 16 Ill., 225.

§ 360. Rule Not Extended to Affect Others than Purchasers.— This doctrine, being originally invoked by courts of equity rather as a measure of necessity, to prevent a failure of justice, than on account of its consistency with abstract justice, and being employed to restrain mere strangers from coming in *pendente lite*, by acquiring an interest in the subject of litigation, the courts have uniformly refused to extend its provisions to others who were not *purchasers* in the strict sense of the term. It will, therefore, not affect either mortgagees, whose securities are prior to the suit, or the holders of antecedently acquired equitable interests in the property.[1] Nor will a purchaser of the property from one who is not a party to the suit be affected. Whatever interest may be acquired from an outside source in this manner will be held unaffected by the suit.[2]

§ 361. Prior Mortgagee Unaffected.— An instance of an attempt to charge a previous mortgagee with constructive notice in this manner is the case of Stuyvesant *v.* Hone.[3] This was where a second mortgagee asked the aid of a court of equity to enforce the familiar doctrine requiring the mortgagee of several tracts pledged to secure the same indebtedness, to proceed by foreclosure against the several tracts in the inverse order of their alienation. The first mortgage covered several tracts, one of which only was covered by the second. Pending a suit to foreclose the second mortgage, of which the first mortgagee had no actual notice, a portion of the property included in the first mortgage, but not in the second, was released without diminishing the indebtedness, thereby leaving the property to which the second mortgagee was forced to look for his security, so heavily incumbered as to materially impair the value of the junior mortgage. The right of the junior incumbrancer to the relief prayed for, depending upon notice, the court held

[1] See Bellamy *v.* Sabine, 1 De G. & J., 566.

[2] Parsons *v.* Hoyt, 24 Iowa, 154; Scarlett *v.* Gorham, 28 Ill., 319; Stuyvesant *v.* Hone, 1 Sandf. Ch., 419.

[3] 1 Sandf. Ch., 419.

that the senior mortgagee could not be charged with constructive notice by reason of the pendency of the suit for foreclosure.[1]

§ 362. **Foreclosure of Prior Mortgage.**—So, a purchaser at a foreclosure sale, where the mortgage was given prior to the institution of a suit brought against the mortgagor with respect to the mortgaged property, was held not to be a purchaser *pendente lite*, within the meaning of the rule, although the decree of foreclosure and the sale were both subsequent to the commencement of the suit.[2]

§ 363. **Antecedent Equity.**—Where one has an equitable interest in the property prior to the suit, and by reason thereof should be made a party defendant, neither he nor his assignee will be affected with notice of the suit, actual or constructive, unless he be made a party, and his interest will only be affected from the time of his being so brought in.[3]

§ 364. **Same.**—The pendency of a suit involving the legal title to the property will not affect the holder of an antecedently acquired equity so as to prevent his clothing himself with the legal title.[4]

§ 365. **Holder of Equity May Acquire Legal Title.**—Accordingly where, in the case of Gibler *v.* Trimble,[5] the legal title to the lands in dispute was in the United States government, and the complainants, by contract of purchase, entered into with the legal holder of certain military land warrants, acquired an interest against such legal holder, in such lands, by virtue of the location of the land warrants; but a purchaser had taken possession, paid the purchase money and made permanent improvements upon the land, by reason of the contract of sale the covenantor became

[1] See, also, Stuyvesant *v.* Hall, 2 Barb. Ch., 151.

[2] Fenwick *v.* Macy, 2 B. Mon., 469; Chondron *v.* Magee, 8 Ala., 570.

[3] Parks *v.* Jackson, 11 Wend., 442.

[4] Gibler *v.* Trimble, 14 Ohio, 323; Clarkson *v.* Morgan, 6 B. Mon., 441; Fogarty *v.* Sparks, 22 Cal., 142; Irvin *v.* Smith, 17 Ohio, 226.

[5] *Supra.*

bound to secure to the covenantee the legal title; and where a suit was instituted against the legal owner of the warrants, to compel their assignment and the conveyance of the land to those equitably entitled thereto, it was held that this would not operate as a *lis pendens* to prevent the purchaser in possession from perfecting his title by procuring a patent from the government.

§ 366. Holder of Contingent Right.— When a contingent right to the property becomes vested by the happening of the contingency, during the pendency of a suit involving the title, he upon whom the title devolves will not be affected with notice of the suit. As where, in Murray *v.* Blatchford,[1] there was a conditional assignment of a mortgage, and during the pendency of a suit by the assignee to foreclose, the condition was broken and the mortgage revested, the mortgagee was held not to occupy the position of a purchaser *pendente lite*, and hence was not bound by the decree rendered.

§ 367. Waiver by Plaintiff.— Where the sale by the defendant, *pendente lite*, is ratified by the plaintiff who prevails in the suit, by taking judgment for the proceeds of such sale, or for the value of the property as for conversion, this will be construed as a waiver of his claim to the thing.[2]

§ 368. Grantor Must be a Party at Time of Purchase.— If, at the time of the sale, the person from whom the purchase is made has not been made a party, the *lis pendens* will not affect the purchaser, although his grantor may subsequently be brought in by summons, or may voluntarily appear; for those purchasers only are charged with notice who purchase from parties to the suit.[3]

§ 369. Generally Confined to Real Estate.— In applying this doctrine the courts have generally manifested an

[1] 1 Wend., 583.

[2] Smith *v.* Brown, 9 Leigh, 293.

[3] French *v.* The Loyal Company, 5 Leigh, 627; Stuyvesant *v.* Hone, 1 Sandf. Ch., 419; 2 Barb. Ch., 151; Parks *v.* Jackson, 11 Wend., 442; Scarlett *v.* Gorham, 28 Ill., 319; Parsons *v.* Hoyt, 24 Iowa, 154.

inclination to restrict its operation to suits in which the title to real property was litigated. In some of the cases this restriction is expressed, while in others doubts seem to be entertained, with a decided inclination to resolve them by declaring against the extension of this unfavored doctrine to sales of personal chattels.[1]

§ 370. **Purchaser of Securities.**— In Watlington *v.* Howley,[2] however, a purchaser of securities, *pendente lite,* was held to be bound by the decree, to the extent that he might be required to restore the securities to the rightful owner, and receive what he had actually paid for them, regardless of what they might be worth at the time.

§ 371. **Same — Illustration — Trusts.**— So Murray *v.* Lylburn[3] was a case involving the application of the principles of *lis pendens* to the assignment of a bond and mortgage, where the securities were assigned by a trustee, pending a suit by the *cestui que trusts,* by bill in equity against such trustee, for a breach of trust, and to take the whole subject of the trust out of his hands, together with all the papers and securities relating thereto. It was held by Chancellor Kent that the *cestui que trusts* could pursue the bond and mortgage in the hands of the assignee, for the reason that the pendency of the suit against the trustee by whom the assignment was made was notice to all the world. The learned chancellor, in rendering the opinion, says: "If W. (the trustee) had held a number of mortgages and other securities, in trust, when the suit was commenced, it cannot be pretended that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash as the proceeds of the trust estate, or negotiable paper not

[1] Winston *v.* Westfeldt, 22 Ala., 760; McLourine *v.* Monroe, 30 Mo., 462; Baldwin *v.* Love, 2 J. J. Marsh., 489. See Bayer *v.* Cockerill, 3 Kans., 282; Cockrill *v.* Maney, 2 Tenn. Ch., 49; Horn *v.* Jones, 28 Cal., 194; Watson *v.* Wilcox, 39 Wis., 643.

[2] 1 Desau., 167.

[3] 2 Johns. Ch., 441.

due, or perhaps movable personal property, such as horses, cattle, grain, etc., I am not prepared to say the rule is to be carried so far as to affect such sales."[1]

§ 372. **Does Not Affect Negotiable Paper.**— The above declaration of this doctrine is sufficiently indicative of the kind of chattels which may be affected by litigation with respect thereto against the legal owner. The cases are numerous in which it has been decided that negotiable instruments, by whatever form of action it is sought to subject them to adverse claims, cannot be affected in the hands of *bona fide* purchasers who acquire them before maturity.[2]

§ 373. **Peculiar Kind of Property.**— In exceptional cases decided with reference to property of a peculiar kind, and which was necessarily governed by peculiar laws, the doctrine has been applied;[3] but as this species of property no longer exists, the principle governing such cases can hardly be applied with safety to sales of chattels, the proprietary interest in which does not depend upon local statutes.

§ 374. **Statutory Provisions.**— In some of the states of the Union, and in England, there have been statutory provisions enacted which materially simplify the operation of a *lis pendens;* for the reason that in order to affect a party with constructive notice of the pendency of a suit, there must be a notice of such suit filed with the officer whose duty it is to register conveyances of real estate. These statutes provide in substance that from the time of such

[1] See, also, Scudder *v.* Van Amburgh, 4 Edw. Ch., 29; Diamond *v.* Lawrence Co. Bank, 1 Wright, 353; Balling *v.* Carter, 9 Ala., 921; Shelton *v.* Johnson, 4 Sneed, 672; Leitch *v.* Wells, 48 N. Y., 585; Hoxie *v.* Carr, 1 Sumn., 173.

[2] Day *v.* Zimmerman, 68 Pa. St., 72; Goodman *v.* Simonds, 20 How., 343; Mines *v.* West, 38 Ga., 18; Winston *v.* Westfeldt, 22 Ala., 760; Hill *v.* Kroft, 29 Pa. St., 186; Kellogg *v.* Fancher, 23 Wis., 21; Stone *v.* Elliott, 11 Ohio St., 252; Kieffer *v.* Ehler, 18 Pa. St., 388; Hibernian Bank *v.* Everman, 52 Miss., 500; Mayberry *v.* Morris, 62 Ala., 113.

[3] Macey *v.* Fenwick, 9 Dana, 198; Smith *v.* Brown, 9 Leigh, 293; Dutton *v.* Warschauer, 21 Cal., 609; Braman *v.* Wilkinson, 3 Barb., 151; Smith *v.* Gibson, 15 Minn., 89; Dixon *v.* La Coste, 1 Sm. & Marsh., 107.

filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby, and hence are regarded as substitutes for Lord Bacon's rule,[1] but not as having the effect to modify the rule that one purchasing with *actual* notice of the litigation will be bound by the decree.[2] Nor do these statutes govern equitable proceedings in the federal courts, except where they are adopted.[3]

§ 375. Purchaser Not Affected Personally — Effect of Judgment. — This rule being only applicable to suits which are in their nature actions *in rem*, the judgment rendered will not bind the purchaser personally, but will only affect the property or interest which is the subject of litigation. The purchaser merely holds the title subject to the judgment. The *lis pendens* ends with the final judgment in the suit.[4]

§ 376. Statute of Limitations Does Not Run During Suit. — During the progress of a suit involving the title to real estate, where the doctrine of *lis pendens* is applicable, the statute of limitations will not run in favor of the purchaser, so as to defeat the operation of the rule.[5]

[1] Haynes *v.* Calderwood, 23 Cal., 409; Hurlbutt *v.* Butenop, 27 Cal., 50; Richardson *v.* White, 18 Cal., 102; Bensley *v.* Mountain Lake Water Co., 13 id., 306; Gregory *v.* Haynes, id., 591; Head *v.* Fordyce, 17 id., 149; Ault *v.* Gassaway, 18 id., 205; Horn *v.* Jones, 28 id., 195.

[2] Sampson *v.* Ohleyer, 22 Cal., 200; Montgomery *v.* Byers, 21 Cal., 107; Grattan *v.* Wiggins, 23 Cal., 16; Sharp *v.* Lumley, 34 Cal., 611; Ferrea *v.* Chabot, 63 Cal., 564.

[3] Majors *v.* Cowell, 51 Cal., 478. See further as to the construction of the statutes, Mills *v.* Bliss, 55 N. Y., 139; Brown *v.* Goodwin, 75 N. Y., 409; Fuller *v.* Scribner, 76 N. Y., 190; Sheridan *v.* Andrews, 49 N. Y., 478; Mitchell *v.* Smith, 53 N. Y., 413; Todd *v.* Outlaw, 79 N. C., 235; Jones *v.* McNarrin, 68 Me., 334; White *v.* Perry, 14 W. Va., 66; Treadway *v.* McDonald, 51 Ia., 663.

[4] Worsley *v.* Earl of Scarborough, 3 Atk., 392; Lane *v.* Jackson, 20 Beav., 535; Lee *v.* Green, 6 De G., M. & G., 155; Proctor *v.* Cooper, 2 Drew, 1; Churchill *v.* Grove, 1 Ch. Cas., 35; Lee Co. *v.* Rogers, 7 Wall., 181; Turner *v.* Crebill, 1 Ohio, 372; Page *v.* Waring, 76 N. Y., 463; Winborn *v.* Gorrell, 3 Ired. Eq., 117.

[5] Henly *v.* Gore, 4 Dana, 133.

§ 377. **Purchaser at Execution Sale.**— Those who purchase at an execution sale will be affected in the same manner as purchasers directly from the defendant, when the action upon which the execution is based has been commenced subsequent to that in which the title to the property is litigated.[1]

[1] Turner *v.* Babb, 60 Mo., 342; Stoddard *v.* Myers, 8 Ohio, 203; Scott *v.* Colman, 5 Monr., 73; Pindall *v.* Trevor, 30 Ark., 249.

CHAPTER VII.

NOTICE BY WHICH CERTAIN LIABILITIES ARE CREATED.

I. Notice of Acceptance of Proposals.
II. Notice of Guaranty.
III. Notice of Assignment.
IV. Notice to Carriers and Other Bailees.
V. Notice of Suit in Ejectment, to Warrantor.
VI. Notice by Which Liability for Tort May be Fixed.
VII. Notice by Which Certain Contract Liabilities May be Fixed.

I. Notice of Acceptance of Proposals.

§ 378. Continuing and Limited Offers.
379. Necessity of Notice.
380. Time.
381. Offer by Auctioneer.
382. Notice May be Oral or Written.
383. By Mail.
384. Continuing Until Accepted, Rejected or Withdrawn.
385. Withdrawal by Mail.

§ 378. **Continuing and Limited Offer.**— One of the necessary ingredients of every contract, and the one which is first in point of time, is the proposal or offer made by the one party to the other. And when such offer is made without express limitation as to the time of its acceptance, it will be regarded as a continuing offer for a reasonable time, or until accepted or withdrawn. When accepted, it ceases to be an offer, because it has then ripened into a contract. When withdrawn, the matter in negotiation is at an end.[1] When the time for acceptance is expressly limited by the proposer, which it is always within his power to do, the proposal falls to the ground at the expiration of that time, unless sooner accepted or withdrawn.[2]

[1] 1 Pars. on Cont., 403, and cases cited; B. & M. L. R. Co. *v.* Unity, 62 Me., 148; Burton *v.* Shotwell (Ky.), 6 Cent. L. J., 31.

[2] 1 Pars. on Cont., 405.

§ 379. **Necessity of Notice.**— It is not sufficient, to constitute a binding contract between the parties, that one of them makes a proposal which is communicated to the other, and that other secretly resolves in his own mind that he will accept the offer made; nor is it even sufficient that he openly declares his acceptance, unless that fact be communicated by him to the party making the proposal. In other words, there must be notice of the acceptance from the accepter to the proposer.[1]

§ 380. **Time.**— The time within which such notice must be given, in order to create a liability against the proposer, will largely depend upon the subject-matter of the contract, and the conduct of the parties to the negotiation. Of course, if the offer be rejected, a subsequent notice of acceptance would be of no avail. It has even been laid down by very high authority, as the general doctrine upon this subject, that if the party to whom the offer is addressed "goes away, and returns the next month, or the next week, and says he will accept the proposition, he is too late unless the proposer assents in his turn. So it would be, probably, if he came the next day, or the next hour; or, perhaps, if he went away at all and afterwards returned."[2]

§ 381. **Offer by Auctioneer.**— Where goods are offered for sale at auction, a bidder is regarded as making an offer or proposal to purchase at the price mentioned in his bid. The offer to be binding upon him must be accepted before he withdraws it, for until accepted it is of no force. When, however, another bid is made, and cried by the auctioneer, this may be regarded by the first bidder as an unequivocal rejection of his proposal, which cannot again become the subject of acceptance unless the latter bid be withdrawn and the former is renewed.[3]

§ 382. **Notice May be Oral or Written.**— Unless the offer stipulates for notice of acceptance in writing, such notice

[1] Benjamin on Sales, § 39 *et seq.*

[2] 1 Pars. on Cont., 404.

[3] Payne *v.* Cave, 3 T. R., 148.

may be given in any manner in which information may be communicated. It may be given either orally or in writing; and when by the latter mode, may be dispatched by a private messenger, by the post, or may be by telegraph.[1]

§ 383. By Mail.— When the negotiations are carried on between the parties by mail, unless otherwise stipulated by the proposer, the contract will be complete from the date of depositing the notice of acceptance in the postoffice; notwithstanding during the time intervening between the posting of the notice, and its receipt by the one who makes the offer, the latter may have concluded to withdraw the proposition.[2] As in the case cited, a purchaser offered a certain price for an estate, which the vendor accepted by post. The letter announcing the vendor's acceptance of the proposal was received by the party making it the day after it was sent. Here it was held that the vendor was bound by the contract from the time of posting his letter of acceptance, for the reason that the notice intended to announce to the purchaser the concurrence on the part of the vendor had gone beyond his recall.[3]

§ 384. Continuing Until Accepted, Rejected or Withdrawn.— It has been held otherwise in this country in several instances,[4] but the weight of authority in the United States as well as in England is decidedly in favor of the rule announced above. It seems also to be the only position on the question that is tenable, upon principles of sound reason. The offer must be regarded as continuing until accepted, rejected or withdrawn. So long as it continues it

[1] Deshon *v.* Fosdick, 1 Woods, 286; Schonberg *v.* Cheny, 6 Thomp. & C. (N. Y.), 200; S. C., 3 Hun, 677.

[2] Potter *v.* Sanders, 6 Hare, 1.

[3] See, also, Brisban *v.* Boyd, 4 Paige, 17; Averill *v.* Hedge, 12 Conn., 424; Mactier *v.* Frith, 6 Wend., 103; Levy *v.* Cohen, 4 Ga., 1; Childs *v.* Nelson, 7 Dana, 281; Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa. St., 339; Dunlop *v.* Higgins, 1 H. L. Cas., 381; Story on Sales, §§ 129, 130, and cases cited.

[4] McCulloch *v.* Eagle Ins. Co., 1 Pick., 278; Gillespie *v.* Edmonston, 11 Humph., 553.

is at the disposal of the party to whom it is made. When he has written and posted an answer to the proposal, notifying the other party that he accepts, he has done all that lies in his power to perfect the contract and render it binding upon himself, and in doing so has rendered it equally binding upon the author of the proposal.

§ 385. **Withdrawal by Mail.**— Professor Parsons, in his very able work on contracts, lays down the rule that the offer may be withdrawn by the maker at any moment; but he qualifies this somewhat by adding that such offer is withdrawn as soon as notice of such withdrawal *reaches* the party to whom it is made, and not before.[1] This would place the proposer in a position at a disadvantage compared to the *status* of the other party. If the acceptance is completed by the deposit of the notice in the postoffice, why may not the proposition be considered withdrawn from the date of posting notice of such withdrawal rather than from the date of its receipt by the party to whom it is addressed? It is true that the notice of withdrawal might be posted subsequent to the posting of the acceptance. In such an event there could be no doubt that the attempt to withdraw the proposition was made too late to take effect.[2] Where, however, the notice of withdrawal is first posted, the same reasoning applied to the notice of acceptance will apply with equal force to the notice intended to put an end to negotiations by retracting the proposal.

[1] 1 Pars. on Cont., 483.

[2] Hutcheson *v.* Blakeman, 3 Met. (Ky.), 80.

II. Notice of Guaranty.

§ 386. Different Forms of Collateral Liability.
387. Division of Subject.
388. Conflicting Decisions.
389. Early Authorities.
390. Guarantor Entitled to Notice of Acceptance — Absolute Guaranty.
391. Proposal to Guaranty.
392. Letter of Credit Held to be Proposal.
393. Reason for Notice of Proposed Guaranty.
394. Absolute Guaranty, Notice Not Required.
395. Distinction Between Different Kinds of Guaranties.
396. Uncertainty of Amount.
397. General Indefinite Letter of Credit.
398. Definiteness of Amount.
399. Guaranty of Proposed Credit.
400. Absolute Guaranty of Uncertain Amount.
401. Notice of Acceptance Held Unnecessary.
402. Continuing Absolute Guaranty.
403. Principles Regarded as Settled.
404. Weight of Authority.
405. Rule as to Indefinite Letters of Credit.
406. Time of Giving Notice of Acceptance.
407. Notice of Action on Guaranty.
408. Change of Manner of Reimbursement.
409. Report of Particular Transactions Not Generally Required.
410. Notice of State of Accounts on Demand.
411. Notice of Principal's Failure.
412. Conflict of Authority.
413. Early Massachusetts Authorities.
414. Demand and Notice Held Necessary.
415. Later Authority — Contra to Above.
416. Indiana Authorities.
417. Negligence of Guarantee.
418. Rule in Connecticut — Absolute Guaranty.
419. Uncertainty of Amounts.
420. Means of Knowledge Within Reach of Guarantor.
421. Pennsylvania Doctrine.
422. Guaranty and Suretyship.
423. Deductions from Authorities.
424. Obligation, Unlimited and Uncertain.
425. Notice Not as of Dishonor of Commercial Paper.
426. Notice Excused — Reasonable Time.
427. Waiver of Notice.

§ 386. **Different Forms of Collateral Liability.**— The doctrine of notice, as it affects the liability of parties collaterally liable, except with reference to indorsers of negotiable paper, which is treated elsewhere,[1] will be here considered without regard to the manner in which such liability is denominated in the contract by which it is created. It may be by an agreement in terms to "guarantee" the performance of the obligation assumed by the party originally liable as principal, or it may be to "secure"[2] such performance; or the form of expression used may be an agreement to be "accountable" or "responsible" for payment of a sum of money due or to become due in the future.[3] The undertaking may be indorsed upon the contract of the principal,[4] it may be by a separate writing executed by the guarantor, reciting the obligation assumed by the principal, which it is proposed to guarantee, in specific terms,[5] or the obligation may be assumed by a letter of credit, general or special,[6] and the application of the rule will be the same in cases belonging to either class, where the obligations assumed are the same in substance.[7]

§ 387. **Division of Subject.**— This branch of the subject will be of threefold consideration. *First*, with reference to notice of the acceptance of the guaranty; *second*, notice of the action taken upon the faith of the guaranty; and *third*, when and under what circumstances notice of the principal's failure to perform is necessary in order to fix the liability of the guarantor.

§ 388. **Conflicting Decisions.**— The doctrine that guarantors are entitled to notice of the acceptance of the

[1] *Post*, ch. X.

[2] True *v.* Harding, 12 Me., 193.

[3] Norton *v.* Eastman, 4 Me., 521; Train *v.* Jones, 11 Vt., 444.

[4] Taylor *v.* Ross, 3 Yerg., 330.

[5] Smith *v.* Ide, 3 Vt., 290.

[6] Russell *v.* Clark, 7 Cranch, 69.

[7] But there is an essential difference between the liability of a guarantor and that of a surety. Ashton *v.* Bayard, 71 Pa. St., 139; Kramph *v.* Hatz, 52 Pa. St., 525.

guaranty, when the obligation assumed is absolute in its terms, has been unequivocally asserted in comparatively few cases in this country, and is said to be utterly repudiated in England.[1] It is, however, probably the prevailing rule in the state of Massachusetts,[2] while in New York it is strenuously denied.[3] As between these two great states, from which we receive so large a part of our commercial law, the latter seems to have by far the largest following upon this question by the other states of the Union.[4]

§ 389. **Early Authorities.**— The first decision bearing upon this question by high authority in this country was in the case of Russell *v.* Clark,[5] where Chief Justice Marshall expressed the opinion that the guarantor could not be held upon the collateral undertaking, even in case it amounted to a contract, absolute in its terms, without notice of acceptance. This was followed by the case of Cremer *v.* Higginson,[6] in which it is laid down by Judge Story that where cash advances were made on the strength of a guaranty, limited to a specific amount, it was the duty of the party making the advances to notify the guarantor of that fact, and that reliance was placed upon the guaranty to insure repayment, and if such notice was not given in a reasonable time the guarantor would be discharged.

§ 390. **Guarantor Entitled to Notice of Acceptance — Absolute Guaranty.**— So, where the contract of the principal was to pay a specific sum in three years, and the contract of guaranty was in the following language: "I will willingly hold myself responsible to you for the above amount provided T. (the principal) should fail to pay at the

[1] Cowen, J., in Douglass *v.* Howland, 24 Wend., 35.

[2] Allen *v.* Pike, 3 Cush., 238; Mussey *v.* Rayner, 22 Pick., 223; Talbot *v.* Gay, 18 Pick., 534.

[3] See New York cases cited *infra.*

[4] Cases cited *infra.*

[5] 7 Cranch, 69.

[6] 1 Mason, 323. See, also, Russell *v.* Perkins, id., 368; Rapelye *v.* Bailey, 3 Conn., 428; Clark *v.* Remington, 11 Met. (Mass.), 361; Babcock *v.* Bryant, 12 Pick., 133.

end of said term of three years," it was held that the guarantor was entitled to notice of the acceptance and of the advances made in reliance upon the guaranty, and where such notice was not given, the guarantor could not be held liable on the contract.[1]

§ 391. Proposal to Guarantee.— Where the contract upon which it is sought to hold the party liable amounts simply to a proposal to guarantee the faithful performance of the principal obligation, and depends upon the consent of the other party to the extension of the credit to the principal obligor, there seems to be no disagreement between the authorities, American or English, as to the right of the guarantor to consider the contract as incomplete until accepted by the other party, of which acceptance he is entitled to notice;[2] although there may be some conflict between them as to what amounts to an absolute guaranty, and what is simply an offer to guarantee.[3]

§ 392. Letter of Credit Held to be Proposal.— The following is an example of a letter of credit which was treated as a mere proposal to enter into such a collateral engagement, for the reason that it was a continuing guaranty; but elsewhere similar undertakings have been regarded as absolute contracts: "Messrs. R. B. & Co.— Our friend, Mr. C. H., to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind our-

[1] Craft *v.* Isham, 13 Conn., 28. See, also, Lowe *v.* Beckwith, 14 B. Mon., 187; Howe *v.* Nickels, 22 Me., 175; Hill *v.* Calvin, 4 How. (Miss.), 231; Beebe *v.* Dudley, 26 N. H., 249; Dunbar *v.* Brown, 4 McLean, 166; Mayfield *v.* Wheeler, 37 Tex., 256.

[2] Norton *v.* Eastman, 4 Me., 522; *infra*, 393, cases cited, note 2; Kellogg *v.* Stockton, 29 Pa. St., 460; Unangst *v.* Hibler, 26 Pa. St., 150; Dixon *v.* Frazer, 1 E. D. Smith, 32. The rule as laid down in Alabama is that the guarantor is entitled to notice unless the guarantor and creditor reside in the same city, and the agreement to accept is contemporaneous with the offer to guarantee. Cahuzac *v.* Samini, 29 Ala., 288.

[3] Birdsall *v.* Heacock (Sup. Ct. Com. O.), 18 Am. L. Rec., 751; Beekman *v.* Hale, 17 Johns., 134.

selves, severally and jointly, to be responsible to you, at any time, for a sum not exceeding $8,000, should the said C. H. fail to do so." It was accordingly held that the party to whom it was addressed, in order to bind the guarantor, should have given him notice of the acceptance of the guaranty.[1]

§ 393. **Reason for Notice of Proposed Guaranty.**— This doctrine is not only supported by the almost unanimous concurrence of the authorities, wherever the question has been raised in connection with a case admitted to be a mere proposal to guarantee,[2] but it is based upon the familiar principle governing all contracts, that an undertaking, to become binding, requires the simultaneous concurrence of the minds of both contracting parties; and where there has been an offer or proposal on the one side, it is pending until accepted or rejected, and notice given of such acceptance or rejection by the one party, or is withdrawn by the other.[3]

§ 394. **Absolute Guaranty, Notice Not Required.**— Where the distinction is observed between such contracts of guaranty as are absolute and complete in their terms, and such as are conditional and incomplete, notice of the assent of the party who acts upon the faith of the former will not be required. Thus an indorsement which recited that: "For value received, I sell, assign and guarantee the payment of the within note to J. A. or bearer," was held an absolute undertaking that the maker would pay when due, or that the guarantor would pay, and that therefore he was not entitled to notice, as in case of a conditional promise.[4]

[1] Douglas *v.* Reynolds, 7 Pet., 113; Kay *v.* Allen, 9 Pa. St., 320.

[2] Stafford *v.* Low, 16 Johns., 67, where the party expressed a willingness to guarantee if required; Birks *v.* Trippet, 1 Saund., 32, where notice was made a condition of the guaranty; also Beekman *v.* Hale, 17 Johns., 134; M'Iver *v.* Richardson, 1 Maule & Selw., 557.

[3] *Ante*, I, Acceptance of Proposals.

[4] Allen *v.* Rightmere, 20 Johns., 365; Bleeker *v.* Hyde, 3 McLean, 279; Breed *v.* Hillhouse, 7 Conn., 523; Foster *v.* Barney, 3 Vt., 60; Train *v.* Jones, 11 Vt., 444; Russell *v.* Buck, id., 166; Penny *v.* Crane Bros. Manuf. Co., 80 Ill., 244; Thompson *v.* Glover (Ky.), 16 Cent. L. J., 16; 8 Rep., 589.

§ 395. Distinction Between Different Kinds of Guaranties.— In some of the cases where the distinction is carefully observed between different kinds of guaranties, the line of demarcation is drawn between such as are mere proposals to guarantee upon conditions therein expressed, and others where the guarantor expressly binds himself by a declaration that he does guarantee at the time.[1] Other cases distinguish between contracts which are specific in amount and definite as to time, or guaranteeing an existing demand, and such as are for an uncertain amount, indefinite as to time, or collateral to a prospective indebtedness.[2]

§ 396. Uncertainty of Demand.— The latter distinction is clearly laid down in a case where, after stating that the principals desired to draw the letter of credit, says: "You will please accept their draft for $2,000, and I do hereby guarantee the punctual payment of it." On the same paper was a letter addressed to the principals, authorizing them to use the letter if they desired. While holding that this was such a letter of credit as would fairly entitle the party collaterally liable thereon to notice of acceptance from the party to whom it is addressed, it was admitted that where the contract was made guaranteeing a specific, existing demand, as a note already made, notice of acceptance of the guaranty would not be necessary.[3]

§ 397. General Indefinite Letter of Credit.— Another example where the contract was positive in its terms is the case of Lawson *v.* Townes.[4] Here the letter of credit was of the most general and indefinite character, being addressed to "whom it may concern;" with no limitation either as to amount or time. It was held that the guarantor could not be held liable to one making advances or extend-

[1] Rankin *v.* Childs, 9 Mo., 673; Smith *v.* Anthony, 5 Mo., 504; Davis Sewing Mach. Co. *v.* Jones, 61 id., 409; Douglas *v.* Howland, 24 Wend., 35.

[2] Lee *v.* Dick, 10 Pet., 482; Wildes *v.* Savage, 1 Story, 22; Walker *v.* Forbes, 25 Ala., 139.

[3] Lee *v.* Dick, 10 Pet., 482; citing with approval, 14 Johns., 349; and Allen *v.* Rightmere, 20 id., 365. See, also, Taylor *v.* Ross, 3 Yerg., 330.

[4] 2 Ala., 373. See, also, Mussey *v.* Rayner, 22 Pick., 223.

ing credit on the faith of the document, without first giving notice of his acceptance and intention to act on its terms. The binding portion of the instrument could not be construed into a mere conditional proposal to guarantee; for it expresses a present undertaking to answer for the principal's default. So that the only ground upon which the guarantor's liability could have been held subject to the giving of notice of acceptance was the uncertainties hereinbefore adverted to.[1]

§ 398. **Definiteness of Amount.**— A subsequent decision by the same court, where the question was raised, renders it quite clear that *definiteness* is the point upon which the right of a guarantor to notice would in their estimation be made to turn.[2] There it was held that where the guaranty is absolute in its terms, and for the payment of a definite, specific demand, there was no sound reason why notice of acceptance should be required to be given to the guarantor to perfect his liability. And Judge GOLDTHWAITE in delivering the opinion of the court declares that the English cases, and the current of American authorities, are in opposition to the rule requiring notice in such cases.

§ 399. **Guaranty of Proposed Credit.**— Where the party originally liable on a contract for the purchase of lumber to be used in building a boat, as principal, upon failure to obtain credit to the amount of his contemplated purchase, applied to another to assist him in obtaining such credit, and made out a bill of the lumber he desired to purchase, adding at the foot a request to the lumber dealer to furnish the quantity stated in the bill, to which was subjoined the guaranty in these words: "I hereby guarantee the payment of the above bill,"— this was held to be such a contract as would require the giving of notice of acceptance before any liability would accrue against the guarantor.[3] In so

[1] *Supra.* See, also, Walker *v.* Forbes, 25 Ala., 139.

[2] Donley *v.* Camp, 22 Ala., 659.

[3] Rankin *v.* Childs, 9 Mo., 673. See, also, Smith *v.* Anthony, 5 Mo., 504; Dobbin *v.* Bradley, 17 Wend., 423.

holding the learned judge delivering the opinion dwelt with emphasis upon the fact that the obligation incurred was for an uncertain amount, and attached to a transaction to take place in the future. He distinguished the case from those holding the guarantor liable where notice of acceptance was neither given nor required, principally on this ground. In a later case by the same court, the alleged contract of guaranty was embodied in a letter requesting the party to whom it was addressed to advance a sum therein specified, and stating that unless the request was acceded to, he would feel obliged to assist the parties for whose benefit the collateral undertaking was proposed, to procure it elsewhere. This was held to be a mere proposal to guarantee, which was incomplete until notice of its acceptance was received.[1]

§ 400. Absolute Guaranty of Uncertain Amount.— In the foregoing cases decided by the supreme court of Missouri, the uncertainty of the amount is considered, and appears to have had no little weight with the court; but in the latest case to be found where the question has been decided by this court, the contract was held to bind the guarantor, notwithstanding notice of acceptance was not given.[2] The terms of the guaranty were in substance that, for value received, the party undertook to guarantee to the plaintiff the performance of a contract previously entered into between said plaintiff and one H. After referring directly to the contract between their principal and the plaintiff, as containing an enumeration of the acts, the faithful performance of which they guaranteed, it was further specified that they guaranteed "the payment by said H. of all indebtedness, by account, note, indorsement of notes or otherwise, which may arise under this contract, * * * to the amount of $600." Here, it is true, the liability was limited by the amount expressed in the writing, but the case was decided upon the ground that, "where a party directly

[1] Central Savings Bank *v.* Shine, 48 Mo., 456.

[2] Davis Sewing Mach. Co. *v.* Jones, 61 Mo., 409.

binds himself to be responsible for the fulfillment of another's contract already made, no such notice can be necessary."

§ **401. Notice of Acceptance Held Unnecessary.**— The cases already cited where absolute contracts of guaranty were held to depend upon notice of acceptance, merely because the obligation incurred was collateral,[1] are reviewed at length and criticised by Judge COWEN in Douglass *v.* Howland.[2] It is there laid down that where one party agrees to account and pay over such sums as shall be found to be owing by him, and a third party guarantees that the party thus agreeing shall perform his agreement, an action will lie against such guarantor in case of the principal's failure to pay, without notice from the creditor of his acceptance of such guaranty.

§ **402. Continuing Absolute Guaranty.**— So, where a bond was delivered, conditioned that it should be void in case the principal should pay all notes made by him in favor of the party taking the bond, to a certain amount therein mentioned, otherwise to remain in full force and effect for a term of years therein specified, this was held to be a continuing guaranty. It was delivered by defendants, at the same time it was accepted by plaintiff; was an *original* collateral agreement, absolute in its terms, and definite both as to time and amount, and was therefore complete upon its delivery without notice of its acceptance being given to the guarantor.[3] A guaranty may be continuing within a limited

[1] Russell *v.* Clark, Cremer *v.* Higginson, Russell *v.* Perkins, Rapelye *v.* Bailey, and Babcock *v.* Bryant, *supra*, § 389.

[2] 24 Wend., 35; Smith *v.* Ide, 3 Vt., 290; Yancey *v.* Brown, 3 Sneed, 89; New Haven Co. Bank *v.* Mitchell, 15 Conn., 206; True *v.* Harding, 12 Me., 193. See, also, Holbrow *v.* Wilkins, 1 Barn. & Cres., 10; Wildes *v.* Savage, 1 Story, 22.

[3] Farmers' & Mechanics' Bank *v.* Kircheval, 2 Mich., 504; Train *v.* Jones, 11 Vt., 444. So where the guaranty expressed a nominal consideration, was by its terms to be a continuing guaranty until countermanded, without limitation as to time or amount, notice of acceptance was held unnecessary. March *v.* Putney, 56 N. H., 34. A guaranty in the following words: "We consider —— —— good for all he may want

amount. And when so expressed as to bear that construction will be enforced, though the full amount of the credit is not given at once.[1] But notice of acceptance is held necessary.[2]

§ **403. Principles Regarded as Settled.**— Any attempt at reconciliation of the authorities upon this question must prove vain. It would be equally fruitless to undertake to deduce from the authorities cited a uniform rule, without entirely discarding some of the opinions expressed upon mature deliberation, by judges distinguished for their learning and research. Some features of the question, however, may be safely regarded as settled beyond question. It cannot be doubted that a mere proposal to guarantee creates no liability until the proposal is accepted.[3] It may further be relied upon if the contract is entered into with reference to an existing demand, and is executed and delivered contemporaneously with the principal undertaking, which is for an ascertained amount, that the guaranty will be complete and binding without notice of acceptance.[4]

§ **404. Weight of Authority.**— Where the obligation attaches to future transactions, there is a controversy which remains undetermined; with the United States courts, and those of one or two of the New England States on the one side,[5] and the courts of England, New York and several other states of the Union on the other. Where, however,

of you, and we will indemnify the same," was held an absolute but not a continuing guaranty. It bound the parties without notice of acceptance, but only for the amount of the first purchase. Whitney *v.* Groot, 24 Wend., 82; Webb *v.* Dickinson, 11 Wend., 6. See, also, Gard *v.* Stevens, 12 Mich., 292; Congdon *v.* Reed, 7 R. I., 576; Baker *v.* Rand, 13 Barb., 152.

[1] Michigan State Bank *v.* Peck, 28 Vt., 200; Lewis *v.* Dwight, 10 Conn., 95.

[2] Tuckerman *v.* French, 7 Greenl., 115.

[3] *Supra*, §§ 391, 392.

[4] *Supra*, §§ 394, 396.

[5] In some of the cases cited, the fact that the transactions are in the future are considered, but only in connection with other circumstances held to be sufficient to entitle the guarantor to notice.

the undertaking is absolute in its terms, to pay unless the principal obligation is fulfilled, and there is a limit both as to time and amount, the weight of authority is decidedly in favor of holding the guarantor on his contract, although no notice of acceptance was given.[1] The same may be said of continuing guaranties generally, which are absolute in their terms.[2]

§ 405. **Rule as to Indefinite Letters of Credit.**— Upon the other hand, where the collateral liability arises on a letter of credit generally or specially addressed, which is indefinite as to the amount, and the time within which the credit or future advances are to be extended or given; although the language of the instrument may be technically consistent with the idea of a present, absolute undertaking, as distinguished from a mere proposal to guarantee, except where it is a continuing guaranty, the party executing such instrument should not be held liable thereon, without notice, express or implied, of the acceptance of the guaranty; unless there had been a previous understanding that the credit would be given in case it was authorized by the guarantor.[3]

§ 406. **Time of Giving Notice of Acceptance.**— Even where the notice is held necessary, the courts have generally been quite liberal as to the time within which it should be given. It is not always essential that it should be given prior to acting upon the faith thereof, but may be in a reasonable time thereafter.[4]

§ 407. **Notice of Action on Guaranty.**— Next, as to notice of the action taken by the party demanding the indemnity, upon the faith of the guaranty. It is not the notice

[1] *Supra*, §§ 394, 396, and cases cited.

[2] *Supra*, § 402.

[3] Or, as in Drummond *v.* Prestman, 12 Wheat., 515, where the guaranty acknowledged the credit already received by the principal. See Anderson *v.* Blakely, 2 W. & S., 237; Aldricks *v.* Higgins, 16 S. & R., 212.

[4] Douglass *v.* Reynolds, 7 Pet., 113; Louisville Manufacturing Co. *v.* Welch, 10 How. (U. S.), 461; Thompson *v.* Glover, 8 Rep., 589.

which is sometimes required, simply that the party to whom the writing is addressed has acted upon the faith of the guaranty by making the solicited advances or extending the desired credit, which comes up for consideration here. Notice of such advances, within a reasonable time, is generally treated as equivalent to antecedent notice of the acceptance of the guaranty.[1] Where the undertaking is in the form of a letter authorizing future advances in cash, or the extension of credit, by indorsement of commercial paper or otherwise, and the letter is intended to cover successive transactions, in sums of various magnitude, as the exigencies of the business to be transacted may demand, it has been claimed that the guarantor was entitled to notice of each transaction as it occurred. This claim, however, except where the terms of the letter of credit specially require it, cannot be maintained.[2]

§ 408. Change of Manner of Reimbursement.— The nearest approach to a holding, that the party acting upon the faith of such a letter was required to submit the details of the business transacted to the guarantor, is found in Edmonston *v.* Drake.[3] There the parties extending the credit were merchants in Havana, who, however, were not the ones to whom the letter was specially addressed. Notice of the first transaction, which was a purchase of the produce of the island, pursuant to the order of the party in whose favor the letter was written, was duly sent to the guarantor, specifying the manner in which payment was to be made — by bills on New York. This was promptly approved by the guarantor, in language which would clearly imply his satisfaction at the course pursued by the Havana correspondents, and would place them upon precisely the same footing with respect to the letter of credit as though it had been originally addressed to them. The letter itself did not specify any particular manner in which payment

[1] Bell *v.* Kellor, 13 B. Mon., 381; Adams *v.* Jones, 12 Pet., 207.
[2] Douglass *v.* Reynolds, *supra*, § 406; Lowe *v.* Beckwith, 14 B. Mon., 184.
[3] 5 Pet., 624.

was to be made to reimburse the merchants extending the accommodation, but upon further advances being made by them, within the limits of the credit authorized, to be paid for by bills drawn upon London, which change was approved by the party in whose favor the credit was given, it was held that, as this alteration in the manner of reimbursement was not submitted to and approved by the guarantor, he did not incur any liability thereby. Mr. Chief Justice Marshall, in rendering the decision,[1] regards the notice of acceptance of the guaranty as a part of the contract between the parties, and the fact that the change was made in the interest and with the consent of their customer as of no consequence, as neither of them had a right to vary a contract for their own advantage at the hazard of the guarantor.

§ 409. **Report of Particular Transactions Not Genally Required.**— If the liability of the guarantor in this case is referred to the correspondence between the parties, commencing with the notice to the guarantor, the justice of this decision may well rest upon the ground that the approval of the substitution of parties who were to act upon the letter, being in response to the notice, might be supposed to adopt the contents of the notice, including the manner and place of payment, as conditions upon which such change was approved. But had the advances been made by one to whom the letter was originally addressed, there being no conditions attached to the guaranty, whereby the guarantor was to exercise a continual supervision of successive transactions, the manner and place of payment, as well as other matters of detail, might have been arranged between the parties immediately interested, without notice to, or consent of, the party collaterally liable.[2]

§ 410. **Notice of State of Accounts on Demand.**— Although the ultimate liability of a guarantor, in case of a continuing guaranty, may not depend upon his receiving

[1] 5 Pet., 638.

[2] Lowe *v.* Beckwith, 14 B. Mon., 184.

notice of each successive transaction had upon the faith of such guaranty, it is doubtless true that upon demand made by him therefor, he would be entitled to information concerning the state of the accounts between the party extending the credit and the one originally liable as principal. His interest in having such knowledge or information could not be questioned. Such contracts are not generally made in anticipation of default by the principal, and are frequently based upon a private understanding between the guarantor and the party for whose benefit the guaranty is made. The information obtained by the guarantor, upon inquiry, might be sufficient to warrant him in refusing to be liable for further advances, and in withdrawing his guaranty, which he might do by notice that he will be no longer responsible.[1]

§ **411. Notice of Principal's Failure.**— Finally, as to notice of the principal's failure to perform. This branch of the question is strangely confused by some of the authorities, with that which has reference to the notice of acceptance. Cases are cited and opinions referred to in support of the doctrine requiring or dispensing with notice of the acceptance of a guaranty, and of the subsequent demand and non-payment by the principal, interchangeably, as though they were one and the same thing. It is true that the general purpose of the notice in both cases is that the guarantor may be advised of his liability. Here, however, the parallel ends. In the one case the notice is intended to render the guarantor liable in case of another's default; in the other he is notified that default has been made, and he becomes liable as though he were a principal. The notice of acceptance, when required at all, is essential to the completion of the contract of guaranty. The notice of the principal's failure is of the happening of the only contingency to the creation of a liability such as would arise from an original, absolute contract, of which the consideration had passed directly to the obligor; it advises the guarantor

[1] Mason *v.* Pritchard, 2 Camp., 436.

that the acceptor of the guaranty has a direct personal demand against him. Both branches of the question, however, are often decided in the same case.[1]

§ 412. **Conflict of Authority.**— The authorities are very conflicting as to whether guarantors, distinctly recognized as such, are entitled to notice of the principal's failure to perform in any event. And where it is held that they are entitled to notice, there is no little contrariety of opinion as to the character of the notice to be given.

§ 413. **Early Massachusetts Authorities.**— It is laid down so repeatedly in the state of Massachusetts in some of the earlier cases, that the guarantor is entitled to notice of a demand upon the principal and non-payment by him, that it was at one time regarded as a settled rule of law in that state, which did not depend upon the nature of the collateral undertaking so long as it was governed by the rules affecting guaranties.[2] This conclusion is clearly deducible from the authorities cited as well as others from the same court, particularly that of Babcock *v.* Bryant,[3] where it was held that a failure to prove such notice was sufficient to defeat plaintiff's action against the guarantor, although it did not appear that there had been such a change in the circumstances of the principal defendant, subsequent to the maturity of the obligation, as to work injury to his guarantor, or to discharge him from liability.

§ 414. **Demand and Notice Held Necessary.**— So in Isley *v.* Jones,[4] where the action was on a guaranty for the payment of the purchase price of goods sold, it was held that the plaintiff must allege and prove that a demand had been made upon the purchaser and that he failed or refused to pay the amount of the demand. On excep-

[1] Louisville Manuf. Co. *v.* Welch, 10 How., 461.

[2] Oxford Bank *v.* Haynes, 8 Pick., 423; Babcock *v.* Bryant, 12 id., 133; Dole *v.* Young, 24 id., 250; Isley *v.* Jones, 12 Gray, 260; Talbot *v.* Gay, 18 Pick., 534.

[3] *Supra.*

[4] *Supra*, § 413.

tions taken to the ruling of the trial court, that notice to the guarantor of such demand and refusal of the principal to comply was not essential to the right of action on the collateral undertaking, the exceptions were sustained by the appellate court.

§ 415. Later Authority — Contra to Above.— In a later case, however, by the same court, the doctrine laid down seems to very materially modify the rules theretofore recognized in that state with reference to the conditions of a guaranty, if it does not abrogate the rule entirely as applied to the question of notice.[1] Judge Wells, in delivering the opinion of the court, says:[2] "The better doctrine, and that which seems to us the best supported, both upon reasoning and authority, is that demand and notice are not essential prerequisites to an action, and need not be alleged nor proved unless the terms of the guaranty, or the nature of the thing guaranteed, require such proceeding in order to a proper fulfillment of the obligations imposed by the guaranty, upon the party holding it, or in order to establish a default by the principal, and a breach of the contract declared on. The necessity of such demand and notice is not incidental to the relation of guarantor and guarantee, as it is to that of indorser and indorsee. It must be derived, if it exist, from the terms of the contract or the nature and circumstances of the particular case, and not from the general rule." The case under review was an action on a guaranty of the payment of rents, in the following language: "I hereby guarantee that G. D. B. shall pay to A. V. $3 per week in advance for rent of house, No. 9 Vinal Place; also $1 per week for back rent now due, * * * this agreement to hold good for nineteen weeks, or until the back rent has been paid." The doctrine laid down in the opinion was applied by the learned judge, who ably reviewed prior authorities, to the circumstances of this case, by holding that as the contract provided for the payment of cer-

[1] Vinal *v.* Richardson, 13 Allen, 521.
[2] Id., 527.

tain sums at certain times, fixed and absolute by the guaranty itself, it required no act of the plaintiff to precede the performance of the principal, except permission to occupy. Non-payment by the principal was at once a breach of his contract and that of his guarantor. The obligation to pay did not depend upon demand, and hence the guarantor's liability could not be made to depend upon notice of such demand. The case of Isley *v.* Jones[1] is expressly overruled, in so far as it differs from this, and other prior cases in conflict must, by implication, be regarded as sharing the same fate.

§ **416. Indiana Authorities.**—In Virden *v.* Ellsworth,[2] which was an action on the following contract of guaranty: "For value received, I guarantee the payment of the rent as stipulated by said F., in case of non-payment by him," the complaint was held bad on demurrer, for the reason that it contained no special averment of notice to the guarantor of the non-payment of the rent, "or any excuse shown for the failure to give such notice or aver it." Such notice was also held essential in an earlier case by the same court, where the action was on a guaranty of payment of the purchase price of goods sold and delivered.[3] Here, however, it appeared that the guarantee had been guilty of *laches*, by which the guarantor was damaged, the principal being solvent at the time of his default, but becoming insolvent before the institution of the suit on the contract of guaranty. Subsequently, in a case where notice was not given until nearly a year after the principal's default, where the question of damage to the guarantor, by the delay, was not raised, it was held by the same court that the guarantor was liable.[4] The agreement contained an express promise to pay or secure a certain sum of money, and the collateral undertaking was an absolute guaranty that the principal

[1] *Supra*, § 413.
[2] 15 Ind., 144.
[3] Smith *v.* Bainbridge, 6 Blackf., 12.
[4] Leonard *v.* Shirts, 33 Ind., 214.

would comply with the terms of his contract. It was held by the court that the *securing* of the indebtedness was a matter for the protection of the guarantors, and the duty rested upon them to see that it was done, and for that reason they could not object to the delay in giving notice. In a still later case, it was decided upon the authority of Smith *v.* Bainbridge[1] and Virden *v.* Ellsworth,[2] that where it appeared that owing to the negligence of the plaintiff in pursuing his remedy against the principal, or notifying the guarantor of the principal's default, the guarantor lost his remedy against the principal by the latter's insolvency, such guarantor would be discharged.[3] In this case the opinion of the court is expressly reserved as to what might be the rule as to notice in a case presenting a different state of facts.[4]

§ 417. Negligence of Guarantee.— The foregoing authorities leave the doctrine to turn upon a question of negligence of the guarantee, by which the guarantor suffers detriment—or rather would suffer detriment, if he were still held on his contract of guaranty. There are also numerous other cases, both American and English, where the same distinction is observed.[5]

§ 418. Rule in Connecticut — Absolute Guaranty.— There are other cases of guaranty where it is held that notice is unnecessary, for the reasons assigned in the summary of the doctrine contained in Vinal *v.* Richardson.[6] As, where the principal contracted with the guarantee to purchase and pay a stipulated price for a certain number of trees which the guarantee undertook to cultivate for him,

[1] *Supra.*

[2] *Supra.*

[3] Gaff *v.* Sims, 45 Ind., 262.

[4] Opinion of Downey, C. J., id., 266.

[5] Gibbs *v.* Cannon, 9 Serg. & R., 198; Woods *v.* Sherman, 71 Pa. St., 100; Sears *v.* Van Dusen, 25 Mich., 351; Green *v.* Thompson, 33 Ia., 293; Janes *v.* Scott, 59 Pa. St., 178.

[6] 13 Allen, 521; Gage *v.* Lewis, 68 Ill., 604; Lamphere *v.* Cowen, 42 Vt., 175.

and to deliver at a certain time, and in default of compliance with the terms of the contract the party so failing should forfeit and pay to the other a certain stipulated sum. This contract was guaranteed on behalf of the principal in these words: "In case B., one of the parties named in the foregoing instrument, should incur the forfeiture mentioned therein, I hereby guarantee the payment of the same." It was held that the guarantor was not entitled to notice of the principal's failure.[1] Here the act guaranteed was to be done by a third person who was known. The guarantor knew its terms and the time of performance as well as the guarantee, and could have ascertained by inquiry whether the forfeiture had been incurred by his principal, so that notice to him was unnecessary.[2] This case also involved the question as to whether the rule would be changed by the subsequent insolvency of the principal, and it was decided that the guarantee was not required to use diligence in proceeding against the principal, and the fact that the latter disposed of his property out of which the debt might have been made, subsequent to the forfeiture, would not discharge the guarantor.

§ **419. Uncertainty of Amount.**— The only material difference between the foregoing case and that of Craft *v.* Isham,[3] previously decided by the same court, was that the amount in the case last cited was uncertain, though strictly limited to a specified sum. The time fixed for payment was at the end of three years. The contract was as unconditional as a guaranty can be — to pay in case the principal failed to do so. The credit on the last item furnished under the guaranty expired in about one year from the date of the guaranty. In about eighteen months thereafter the

[1] Hammond *v.* Gilmore, 14 Conn., 479.

[2] Farm. & Mech. Bank *v.* Kercheval, 2 Mich., 504; Ward *v.* Henry, 5 Conn., 595; Breed *v.* Hillhouse, 7 Conn., 523; Williams *v.* Granger, 4 Day, 444; Wright *v.* Simpson, 6 Ves. Jr., 714–34; Duffield *v.* Scott, 3 T. R., 374; Vyse *v.* Wakefield, 6 Mees. & W., 442; Brackett *v.* Rich. 23 Minn., 485.

[3] 13 Conn., 28.

principal became insolvent, but notice was not given of his failure to pay until six months after the expiration of the three years. It was held that the guarantor was entitled to notice within a reasonable time of the principal's default, and that the time in which it was given in this case was not reasonable. The court in this case follows the decisions of the United States courts already cited, as well as the early Massachusetts cases, and the manner in which the case of Hammond *v.* Gilmore [1] is distinguished from that of Craft *v.* Isham [2] is that the latter was a case of guaranty by a letter of credit, and the amount involved was unliquidated.

§ 420. Means of Knowledge Within Reach of Guarantor.— In a recent case decided in Missouri, where the guaranty was of the collectibility of certain notes, it was decided that notice was unnecessary.[3] Judge WAGNER, in rendering the opinion of the court, lays it down that when a guarantor binds himself to be answerable for a specific sum, under certain designated circumstances, he has the means within his own hands of determining the extent of his obligations. The learned judge makes the following apt quotation from Lord ABINGER in Vyse *v.* Wakefield:[4] "The rule to be collected from the cases seems to be this: that when a party stipulates to do a certain thing, in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to notice unless he stipulates for it; but where it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." [5]

[1] *Supra*, § 418.

[2] *Supra.*

[3] Barker *v.* Scudder, 56 Mo., 272.

[4] 6 Mees. & W., 442.

[5] See, also, Clay *v.* Edgerton, 19 Ohio St., 549; Marvin *v.* Adamson, 11 Ia., 371; Hough *v.* Gray, 19 Wend., 202; Heaton *v.* Hulbert, 4 Ill., 489; Partridge *v.* Davis, 20 Vt., 499; Sample *v.* Martin, 46 Ind., 226; Burnham *v.* Gallentine, 11 Ind., 295; Watson *v.* Beabout, 18 Ind., 281; Studebaker *v.* Cody, 54 Ind., 586; Prentiss *v.* Garland, 64 Me., 155; Bashford *v.* Shaw, 4 Ohio St., 263.

§ 421. **Pennsylvania Doctrine.**—The distinction observed by the supreme court of Pennsylvania between contracts of guaranty and contracts of suretyship is one which, however well founded in reason, would tend to mislead the inquirer as to the views of that court upon the question of notice to guarantors, if their decisions of the question are to be interpreted by the definition of the term "guaranty" which seems to prevail elsewhere. There the term is restricted in its application to such contracts as warrant the ability of the principal to pay or perform. It is simply an undertaking that the principal will be solvent when the obligation matures, or what would elsewhere be construed as a guaranty of collectibility; while that which we have followed the authorities of other states in treating as an absolute or unconditional guaranty of payment or performance by one originally liable as a principal, is there regarded as a contract of suretyship.[1]

§ 422. **Guaranty and Suretyship.**—It does not seem to be material that the words "guarantee" or "guaranty" are used in the undertaking; it will not be construed as a guaranty for that reason if it imports an absolute undertaking to be responsible for the payment or discharge of the obligation by the principal.[2] In the case cited Judge Sharswood remarks:[3] "The leaning of this court of late years has, therefore, very properly been against construing such contracts to be general guaranties." The language of the contract under consideration was as follows: "I do hereby guarantee to S. & Co. the payment of contract made by them with D. & W. to the amount of $10,000." Though the question was not properly before the court, it being unnecessary to a decision, the learned judge plainly intimated that

[1] Reigart *v.* White, 52 Pa. St., 438; Brown *v.* Brooks, 25 id., 210; Johnston *v.* Chapman, 3 Pa., 18; Isett *v.* Hoge, 2 Watts, 128; Rudy *v.* Wolf, 16 Serg. & R., 79; Kramph *v.* Hatz, 52 Pa. St., 525; Ashton *v.* Bayard, 71 Pa. St., 139; Woods *v.* Sherman, 71 Pa. St., 100.

[2] Woods *v.* Sherman, 71 Pa. St., 100.

[3] Id., 104.

had it been raised this would have been construed as a contract of suretyship, upon which the obligor would be liable to the party for whose security it was given without antecedent notice of the principal's default.[1] Where, therefore, we find the authorities of this state holding that notice of the principal's default is necessary to hold the guarantor on his contract, and that the remedy must first be exhausted against a solvent principal before an action can be maintained against the guarantor, it should be understood as applying only to contracts guaranteeing the principal's solvency.[2]

§ **423. Deductions from Authorities.**— From a consideration of the reported cases bearing upon the question, the current of authority seems to be decidedly in favor of the doctrine that where the contract of guaranty contemplates indemnity to the guarantee in a certain sum, or a sum capable of being ascertained with readiness by the guarantor, within a certain time, and depending upon the single contingency of the principal's failure to perform, notice of such failure is not a condition precedent to the guarantee's right of recovery against the guarantor. Where the guaranty is of the payment of a promissory note, or other demand, for a fixed sum, already owing by the principal, and the contract of guaranty is expressed in the usual form, the rule is more uniform. In fact, the later authorities are almost, if not quite, unanimous in holding that notice in such cases is unnecessary.[3] But where the obligation guaranteed is of future performance, and the amount is uncertain within a limit, there is a disagreement which we shall not endeavor

[1] See, also, Amsbaugh *v.* Gearhart, 11 Pa. St., 482; Marberger *v.* Pott, 16 id., 9; Campbell *v.* Baker, 46 id., 243; Allen *v.* Hubert, 49 id., 259.

[2] See, also, Clay *v.* Edgerton, 19 Ohio St., 549; Marvin *v.* Adamson, 11 Ia., 371; Hough *v.* Gray, 19 Wend., 202; Heaton *v.* Hulbert, 4 Ill., 489; Partridge *v.* Davis, 20 Vt., 499; Sample *v.* Martin, 46 Ind., 226; Burnham *v.* Gallentine, 11 Ind., 295; Watson *v.* Beabout, 18 Ind., 281; Studebaker *v.* Cody, 54 Ind., 586; Prentiss *v.* Garland, 64 Me., 155.

[3] Parman *v.* Brewster, 15 Gray, 271.

to reconcile. However, the current of modern American and English authority is against the observance of the distinction predicated simply upon the fact that the sum of the principal's liability actually incurred is uncertain.[1]

§ 424. **Obligation Unlimited and Uncertain.**— Where, however, the obligation assumed by the principal is not only uncertain in amount within a fixed limit, but is unlimited, and for an uncertain time, or depends upon other contingencies besides the failure of performance of the principal, the knowledge of the happening of which from the circumstances would properly be with the guarantee, notice of the accruance of the liability as well as notice of the acceptance of the guaranty should be given the guarantor within a reasonable time, and such notice should be at least approximately certain as to the amount of the principal's indebtedness for which the guarantor is collaterally liable.

§ 425. **Notice Not as of Dishonor of Commercial Paper.**— In no case is it held that the guarantor is entitled to notice within the time, or according to the formalities required in order to bind drawers and indorsers of commercial paper. Even where such notice has been held essential to the liability of guarantors, the courts have been liberal as to the time in which it should be given;[2] and have even held that it would be sufficient when given after the suit, commenced without it, had been discontinued, provided the guarantor had not suffered detriment by the delay.[3]

§ 426. **Notice Excused — Reasonable Time.**— And in cases decided by the courts of highest authority, where it is held necessary to give notice to the guarantor of the principal's default, it is held that where the principal, at the maturity of the demand, has become insolvent, and utterly incapable of responding to the claim, notice will be excused, and even when necessary the time within which it

[1] Holbrow *v.* Wilkins, 1 B. & C., 10.
[2] Babcock *v.* Bryant, 12 Pick., 133.
[3] Dole *v.* Young, 24 Pick., 250.

is given will be held reasonable or unreasonable, according to the circumstances of the parties and the probabilities of injury to the guarantor by reason of the delay.[1]

§ 427. **Waiver of Notice.**— It seems hardly necessary to add that in any case where the fact of the principal's default is well known to the guarantor, or where he, in anticipation of such default, either expressly or by implication *waives* notice, he cannot afterwards take advantage of a technical failure to notify him of such default.[2] And the same doctrine as to waiver and excuse of notice would apply with equal force to notice of acceptance of guaranty.

[1] Louisville Manufac. Co. *v.* Welch, 10 How., 461; Bebee *v.* Dudley, 26 N. H., 249; Walker *v.* Forbes, 25 Ala., 139; March *v.* Putney, 56 N. H., 34; Fegenbush *v.* Lang, 28 Pa. St., 193, Bull *v.* Bliss, 30 Vt., 127; Dole *v.* Young, 24 Pick., 250.

[2] Bickford *v.* Gibbs, 8 Cush., 154.

III. Notice of Assignment of Choses in Action.

§ 428. Definition of Choses in Action.
429. Not Assignable at Common Law.
430. Assignment Transfers Claim.
431. Assignee Takes Subject to Equities.
432. Effect of Notice.
433. Assignment Incomplete Without Notice.
434. Held Necessary as Against Creditors.
435. Object of Notice.
436. Assignee Takes No More than Assignor Had.
437. By Whom Notice Given — Manner of Giving Notice.
438. Knowledge Presumed.
439. Put Upon Inquiry.
440. Double Purpose of Notice — Laches of the Assignee.
441. Overdue Bills.
442. Negotiable Paper Without Indorsement.
443. Balance Due on Account.
444. Policies of Insurance.
445. Notice to Insurer.
446. Conditions of Policy.
447. Assignments of Subject of Insurance.
448. By Retiring Partners.
449. Notice May be Implied.
450. Assignment After Loss.

§ 428. Definition of Choses in Action.— The definition of *choses in action*, as given by Mr. Blackstone, only includes debts due or damages recoverable for the breach of a contract, express or implied.[1] But later authorities have enlarged the definition so as to embrace all rights to personal property not in possession, which may be enforced by action, whether the owner has been deprived of such possession by the tortious acts of another, or by the breach of an express or implied contract.[2]

[1] 2 Bl. Com., 396–7.

[2] Gillet *v.* Fairchild, 4 Den., 80; Hall *v.* Robinson, 2 Comst. (N. Y.), 293; North *v.* Turner, 9 S. & R., 244; Jordan *v.* Gillen, 44 N. H., 424; Griffin *v.* Wilcox, 21 Ind., 370; Final *v.* Backus, 18 Mich., 218; More *v* Massini, 32 Cal., 590.

§ 429. **Not Assignable at Common Law.**—It is a rule of the common law, too familiar to require citation or illustration, that rights of this nature are not assignable, so as to allow the assignee to maintain an action for the thing assigned in his own name. But courts of equity and modern statutes have virtually abrogated this rule. The law merchant has established a different doctrine with respect to negotiable instruments assigned before maturity; but in so far as the doctrine of notice affects commercial paper, it is treated at length in a subsequent chapter.[1]

§ 430. **Assignment Transfers Claim.**—The notice required in cases of assignment cannot be said in the strictest sense to create a liability. The original liability is created when the obligation is incurred by the debtor. The assignment merely transfers the claim from the original creditor to his assignee, and notice to the debtor imposes upon him an obligation to recognize the transfer, and pay the amount due to the assignee.[2]

§ 431. **Assignee Takes Subject to Equities.**—One of the incidents of assignments of demands not recognized as negotiable, according to the law merchant, as well as overdue negotiable paper, is that the assignee takes subject to all equities subsisting between the parties at the time.[3] The debtor is entitled to all credits for payments, as well as all set-offs which he may have against his original creditor.[4] Even after the assignment has been made, the debtor, being ignorant of that fact, will be protected in making payment of the debt in whole or in part,[5] or in any set-off to the de-

[1] *Post*, ch. X.

[2] Jones *v.* Witter, 13 Mass., 304; Rodick *v.* Gandell, 1 De G., M. & G., 763; *In re* Way's Trusts, 2 De G., J. & S., 365; Donaldson *v.* Donaldson, Kay, 711; Southard *v.* McBrown, 63 Cal., 545.

[3] Sanborn *v.* Little, 3 N. H., 359.

[4] Ford *v.* Stuart, 19 Johns., 342; Bank of Niagara *v.* McCracken, 18 Johns., 493; Gould *v.* Chase, 16 Johns., 226; Hackett *v.* Martin, 8 Me., 77.

[5] Murray *v.* Lylburn, 2 Johns. Ch., 441; Livingston *v.* Dean, id., 479; Davis *v.* Barr, 9 S. & R., 137; Mangles *v.* Dixon, 3 H. L. Cas., 703; Life Ins. Soc'y *v.* Pooly, 5 Jur., N. S., 129; Faull *v.* Tinsman, 36 Pa. St.,

mand he may have acquired.[1] The right of the assignee, except where the assignment is authorized by statute, being equitable rather than legal, no court of equity would be willing to interpose in his behalf, where the consequence would be to subject the innocent debtor to the hardship of being compelled to make double payment of the demand.[2] Where the *chose in action* is not negotiable, the debtor may avail himself of any defenses he may acquire prior to the notice of assignment.[3]

§ **432. Effect of Notice.**—But after the debtor has received notice of the assignment of the demand, he cannot discharge any portion of the indebtedness by payment to the assignor.[4] Nor can he acquire any defense to an action for the debt assigned, as between himself and the assignor.

108; Hogan *v.* Black, 4 Pac. Rep., 943; Bishop *v.* Garcia, 14 Abb. Pr., 69; Loudon *v.* Tiffany, 5 Watts & S., 367; Rider *v.* Johnson, 20 Pa. St., 190; Kellogg *v.* Smith, 26 N. Y., 18; Reed *v.* Marbley, 10 Paige, 409; Van Keuren *v.* Corkins, 66 N. Y., 77; N. Y. Life Ins. Co. *v.* Smith, 2 Barb. Ch., 82; Upton *v.* Moore, 44 Vt., 552; Atkinson *v.* Runnells, 60 Me., 440; Brashear *v.* West, 7 Pet., 608; Cook *v.* Mut. Ins. Co., 53 Ala., 37.

[1] Myers *v.* Davis, 22 N. Y., 489; Barlow *v.* Myers, 64 N. Y., 41; Frick *v.* White, 57 N. Y,, 103; Adams *v.* Rodermel, 19 Ind., 339; Morrow's Assignees *v.* Bright, 20 Mo., 298; Miller *v.* Florer, 15 Ohio St., 148; Richards *v.* Daily, 34 Iowa, 427; Norton *v.* Foster, 12 Kans., 44; Harris *v.* Barwell, 65 N. C., 534.

[2] Comstock *v.* Farnum, 2 Mass., 96; Stocks *v.* Dobson, 19 E. L. & E., 96; Hatch *v.* Dennis, 10 Me., 244.

[3] Western Bank *v.* Sherwood, 29 Barb., 383; Andrews *v.* Gillespie, 47 N. Y., 487; Wanzer *v.* Carr, 76 N. Y., 526; Ingraham *v.* Disborough, 47 N. Y., 421; Reeves *v.* Kimball, 40 N. Y., 299; Kamena *v.* Huelbig, 23 N. J. Eq., 78; Barney *v.* Grover, 28 Vt., 391; Kleeman *v.* Frisbie, 63 Ill., 482; Ainslee *v.* Boynton, 2 Barb., 258; Bank *v.* Fordyce, 9 Pa. St., 275; Andrews *v.* McCoy, 8 Ala., 920; Martin *v.* Richardson, 68 N. C., 255; Jordan *v.* Black, 2 Murph. (N. C.), 30; McKinne *v.* Rutherford, 1 Dev. & Bat. Eq., 14; Moody *v.* Setton, 2 Ired. Eq., 382; Jeffries *v.* Evans, 6 B. Mon., 119; Ragsdale *v.* Hogg, 9 Gratt., 409; Hall *v.* Hickman, 2 Del. Ch., 318.

[4] Fanton *v.* Fairfield Co. Bank, 23 Conn., 485; Jones *v.* Witter, 13 Mass., 304; Raymond *v.* Squire, 11 Johns., 47; Small *v.* Browder, 11 B. Mon., 212; Pollard *v.* Somerset Mut. Fire Ins. Co., 42 Me., 221; Fay *v.* Jones, 18 Barb., 340; Succession of Risley, 11 Rob. (La.), 298; Noble *v.* Thompson Oil Co., 79 Pa. St., 354.

§ 433. Assignment Incomplete Without Notice.— In one case, while admitting that the weight of American authority seemed to favor the doctrine that the assignment of a *chose in action* was complete in itself and vested a perfect title in the assignee as against third persons, the court maintained that the contrary was the settled doctrine of the English and some of the American courts, and in that case chose to follow the English as the more reasonable and practical rule.[1] It was accordingly there held that the assignment of a *chose in action* was not complete so as to vest the title absolutely in the assignee until notice to the debtor of the assignment. And therefore, as between successive purchasers or assignees, he would be entitled to preference who first gave notice to the debtor, though he held by an assignment subsequent to that of the others.[2]

§ 434. Held Necessary as Against Creditors.— So it has been held that notice is not only necessary to render such assignment binding upon the debtor, but that he

[1] Clodfelter *v.* Cox, 1 Sneed, 330. The English rule, as gathered from the following authorities, is that the assignment will be incomplete as against subsequent assignees without notice. And that where there are two or more successive assignees of the same *chose in action*, the first to give notice will have the prior right: Loveridge *v.* Cooper, 3 Russ., 31; Meux *v.* Bell, 1 Hare, 73; Dearle *v.* Hall, 3 Russ., 1; Saffron, etc., Soc. *v.* Rayner, L. R., 14 Ch. D., 406; Ryall *v.* Rowles, 1 Ves. Sen., 348; *Ex parte* Garrard, L. R., 5 Ch. D., 61; Addison *v.* Cox, L. R., 8 Ch., 79. And this notice has been held to be a formal matter, which is not obviated by actual knowledge of the prior assignment. The subsequent assignee will have the prior claim to the debt or fund, if he is first to give formal notice to the debtor or trustee. Edwards *v.* Martin, L. R., 1 Eq., 121; *In re* Brown's Trusts, L. R., 5 Eq., 88. But this position is not supported by the weight of English authority. Bridge *v.* Beadon, L. R., 3 Eq., 664; Lloyd *v.* Banks, L. R., 3 Ch., 488; *In re* Atkinson, 2 De G., M. & G., 140; Thompson *v.* Speirs, 13 Sm., 469; *In re* Barr's Trusts, 4 K. & J., 219; Martin *v.* Sedgwick, 9 Beav., 333. Where simultaneous notices are given by successive assignees, the order of priority will be the date of assignment. Lloyd *v.* Banks, L. R., 3 Ch., 488; Calisher *v.* Forbes, L. R., 7 Ch., 109. See, also, Feltham *v.* Clark, 1 De G. & Sm., 307; Langton *v.* Horton, 1 Hare, 549.

[2] See *infra*, § 436.

should be notified in order to render the assignment effectual as against attaching creditors.[1] Thus, if garnishment be served upon the debtor, and he answer without notice of the assignment, and, while he is still ignorant of the transfer, judgment is rendered against him in favor of the garnishor, he will be protected thereby against a subsequent suit brought by the assignee.[2] But if he have received notice, and fail to disclose it prior to judgment, the judgment against him as garnishee will be no defense to the action by the assignee.[3]

§ 435. **Object of Notice.**— The object of requiring notice of the assignment of a *chose in action* is not, however, to affect the relative rights of the assignor and the assignee. It is simply to inform the debtor that he is no longer under any pecuniary obligation to his former creditor; that the latter has, by the assignment, divested himself of all right to the disposition of the money due, and invested his assignee with that right.[4] The declaration of the rule, therefore, that notice is absolutely necessary to perfect the assignment, must be understood with the qualification that it is not necessary in order to render the assignment binding upon the assignor, but only to bind the debtor and those who

[1] Dix *v.* Cobb, 4 Mass., 508. But see Stevens *v.* Stevens, 1 Ashm. (Pa.), 190, where assignment is held good against attaching creditor if notice is given after garnishment, provided the garnishee have notice before answer. Stockton *v.* Hall, Hard. (Ky.), 160.

[2] McCord *v.* Beatty, 12 Iowa, 299; Richards *v.* Griggs, 16 Mo., 416; Dodd *v.* Bratt, 1 Minn., 270; Tudor *v.* Perkins, 3 Day, 354.

[3] Crayton *v.* Clark, 11 Ala., 787; Foster *v.* White, 9 Port., 221; Lamkin *v.* Phillips, 9 Port., 98; Colvin *v.* Rich, 3 Port., 175; Pitts *v.* Mower, 18 Me., 361; Nugent *v.* Opdike, 9 Rob. (La.), 453; Bunker *v.* Gilmore, 40 Me., 88; Page *v.* Thompson, 43 N. H., 373; Prescott *v.* Hull, 17 Johns., 284; Walters *v.* Wash. Ins. Co., 1 Iowa, 404; Kimbrough *v.* Davis, 34 Ala., 583; Large *v.* Moore, 17 Iowa, 258. See, also, Bevan *v.* Lord Oxford, 6 De G., M. & G., 492; Pickering *v.* Ilfracome R'y, L. R., 3 C. P., 235; Eyre *v.* McDowell, 9 H. L. Cas., 619; Scott *v.* Lord Hastings, 4 K. & J., 633; Crow *v.* Robinson, L. R., 3 C. P., 264; Kinderley *v.* Jervis, 22 Beav., 1.

[4] Gardner *v.* Lachlin, 4 Mylne & Cr., 129.

claim under him as creditors,[1] and, we have seen it asserted, *innocent* purchasers from the assignor;[2] for it certainly cannot be claimed, in the case cited, that subsequent assignees of a *chose in action* who take the same with notice of the former assignment can gain any advantage by being beforehand with the prior assignee in giving notice to the debtor.

§ 436. Assignee Takes No More than Assignor Had.— Whether a subsequent assignee of a non-negotiable *chose in action* would be protected in any event in his purchase depends somewhat upon the construction to be given to such assignments. If the authorities are to be relied upon in this respect, it may be safely assumed that the assignee takes no greater right in the security assigned than his assignor had before the transfer, and that the purchaser takes the demand subject to all equities subsisting against it in the hands of his assignor.[3] Notice is not necessary to divest the assignor of all right or title to the thing transferred. However ineffectual his act may have been to clothe his assignee with the character of a creditor, as between such assignee and the party indebted, so as to oblige the latter to recognize the claim, he has at least parted with his entire interest in the debt, and ceased to have any rights, equitable or legal, with respect thereto. This being his *status*, it is difficult to see how he can transfer anything to a subsequent assignee. The doctrine laid down in Clodfelter *v.* Cox[4] is unsupported either by reason or authority. It was not only unnecessary to a decision of the case, but

[1] *Supra*, § 434, note.

[2] Clodfelter *v.* Cox, 1 Sneed, 330.

[3] Bush *v.* Lathrop, 22 N. Y., 535; Bartlett *v.* Pearson, 29 Me., 9, 15; 1 Pars. on Cont., 227, and cases cited; Norton *v.* Rose, 2 Wash. (Va.), 233; Thayer *v.* Daniels, 113 Mass., 129; Warren *v.* Copelin, 4 Met., 594; Wood *v.* Partridge, 11 Mass., 488; Dix *v.* Cobb, 4 Mass., 508; Bohlen *v.* Cleveland, 5 Mason, 174; U. S. *v.* Vaughan, 3 Binn., 394; Littlefield *v.* Smith, 17 Me., 327; Muir *v.* Schenck, 3 Hill, 228; Kennedy *v.* Parke, 17 N. J. Eq., 415; Beckwith *v.* Union Bank, 9 N. Y., 211.

[4] *Supra*, 1 Sneed, 330.

it did not have the slightest influence upon the decision, as it was decided in favor of the prior assignee, and the adverse party claimed in the capacity of an attaching creditor rather than a subsequent assignee. Nevertheless, the English doctrine that, as between successive assignees, he who shall first give notice of the assignment shall prevail, is supported by numerous American authorities. But a subsequent assignee, to gain a prior right by service of notice on the debtor, must be a purchaser in good faith, and for a valuable consideration.[1]

§ 437. **By Whom Notice Given — Manner of Giving Notice.**— The notice will, from the situation of the parties and their interest in the event, generally come from the assignee of the debt or demand. It is for his interest that the notice is given. He is the party to be benefited thereby. But it is probable that notice or knowledge of the assignment, coming to the debtor from any source, would so far affect his conscience as to prevent him from discharging the indebtedness by payment to his original creditor. The notice may be either written or verbal, provided it be sufficiently certain and specific to inform the debtor fully of the assignment.[2] And, when there are several joint debtors, a notice to one has been held notice to all, in order to give the assignee a complete right of action against the debtor.[3]

§ 438. **Knowledge Presumed.**— Facts and circumstances sufficient to raise a presumption of knowledge in the debtor,

[1] Spain *v.* Hamilton's Ex'rs, 1 Wall., 604; Ward *v.* Morrison, 25 Vt., 593; Dale *v.* Kimpton, 46 Vt., 76; Loomis *v.* Loomis, 26 Vt., 198; Barney *v.* Douglas, 19 Vt., 98; Barron *v.* Porter, 44 Vt., 587; Foster *v.* Mix, 20 Conn., 395; Bishop *v.* Holcomb, 10 Conn., 444; Van Buskirk *v.* Hartford, etc., Ins. Co., 14 Conn., 141; Adams *v.* Leavery, 20 Conn., 72; Judah *v.* Judd, 5 Day, 534; Woodbridge *v.* Perkins, 3 Day, 364; Harrop *v.* Landers, etc., Co., 45 Conn., 561; Dews *v.* Olevill, 3 Baxt., 432; Flickey *v.* Loney, 4 Baxt., 169; Hobson *v.* Stevenson, 1 Tenn. Ch., 203. See Murdock *v.* Finney, 21 Mo., 138; Gayoso Sav. Inst. *v.* Fellows, 6 Coldw., 467; McWilliams *v.* Webb, 32 Iowa, 577.

[2] Brown *v.* Savage, 4 Drew, 635; *In re* Tichnor, 35 Beav., 317.

[3] Timson *v.* Ramsbottom, 2 Keen, 35; *Ex parte* Rogers, 8 De G., M. & G., 27; Wise *v.* Wise, 2 Jones & L., 403.

of the assignment of the debt, have been held to amount to notice by which he would be estopped from the acquisition of a defense against the same, subsequent to his knowledge of such facts.[1] Here the doctrine was distinctly recognized, that after the assignment, whether notice had been given or not, the assignor had no more power over the *chose in action* than a mere stranger. But the subject of the assignment, being in the shape of a note, which was transferred without indorsement, and for that reason subject to equities, knowledge of the fact that such note was in the hands of the assignee was held sufficient to raise a presumption that the maker had notice of the assignment from the time he knew of such possession.[2] But it has been held, on the other hand, that merely putting a letter in the postoffice, directed to the debtor, and containing a notice of the assignment, would not be sufficient to vest such title to a note thus assigned in the assignee as would enable him to maintain an action thereon against the debtor, where the letter containing the notice was never received by the party to whom it was addressed.[3]

§ 439. **Put Upon Inquiry.**— But where the assignor of a warehouse receipt was in possession of sufficient notice to put him on inquiry which would have led to a knowledge of its fraudulent issue, not only would he be affected with full knowledge of the taint, but an equity in favor of the true owner of the goods stored would attach to the receipt and follow it into the hands of the assignee, who would hold the same subject to all such equities as his assignor had received notice of prior to notice of the assignment.[4]

[1] Hackett *v.* Martin, 8 Me., 77.

[2] Id., 79; Ellis *v.* Kreutzinger, 27 Mo., 311; Wells *v.* Archer, 11 S. & R., 412; Aucher *v.* Bank of England, Dougl., 637. But see Cahoon *v.* Morgan, 38 Vt., 234, where it is held that a demand from the assignee is not sufficient notice.

[3] Judah *v.* Judd, 5 Day, 534.

[4] Commercial Bank of Rochester *v.* Colt, 15 Barb., 506. See Smith *v.* Smith, 2 Cr. & M., Exch., 231, where information in course of casual conversation was held sufficient.

§ 440. **Double Purpose of Notice — Laches of the Assignee.**— It will be observed that this notice serves a double purpose. It is not only intended to affect the debtor so as to cut off subsequently-acquired defenses against the assignor, but it is to inform such debtor of his liability to the assignee. When the latter demands payment, he ought to be prepared, not only to give such notice as would suffice to prevent payment to the assignor, but to satisfy the debtor of the reality of the transaction, so that he could have no reason to doubt it.[1] Independent of the technical necessity of notice to the debtor, the assignee may, by his negligence, lose the advantage of priority gained over subsequent assignees.[2] Notice to the custodian of chattels of their transfer to another has also been held equivalent to delivery.[3]

§ 441. **Overdue Bills.**— The rule requiring notice to the debtor of the assignment of a demand in favor of his creditor, in order to create a liability as between him and the assignee, is not confined to such as do not belong to the class known as negotiable instruments. It applies to all such instruments as bear on their faces the evidence of dishonor. A note or bill which is past due and unpaid will be subject, in the hands of an assignee, until the debtor is notified of the assignment, to the same equities as would have affected it in the hands of the party from whom it was received.[4]

§ 442. **Negotiable Paper Without Indorsement.**— And even negotiable paper, assigned before maturity, will be subject to the same rule when it passes otherwise than by

[1] Davenport *v.* Woodbridge, 8 Me., 17; Johnson *v.* Bloodgood, 1 Johns. Cas., 51; Bean *v.* Simpson, 16 Me., 49; Anderson *v.* Van Allen, 12 Johns., 343.

[2] Fraley's Appeal, 76 Pa. St., 42; Fisher *v.* Knox, 13 Pa. St., 622; Mercantile Ins. Co. *v.* Corcoran, 1 Gray, 75; Judson *v.* Corcoran, 17 How., 612; Richards *v.* Griggs, 16 Mo., 416; Pinkerton *v.* Manchester, etc., R. Co., 42 N. H., 424.

[3] Lufkins *v.* Collins (Idaho), 6 West Coast Rep., 594.

[4] Story on Prom. Notes, § 190, and cases cited.

indorsement. It is not, therefore, the essential character of the demand assigned which renders notice necessary, so much as the manner in which the title thereto is transferred. When the written evidence of indebtedness is non-negotiable or overdue, indorsement will not obviate the necessity of notice; but when negotiable paper requiring indorsement is assigned by delivery, notice has been held necessary to perfect the assignment.[1]

§ 443. **Balance Due on Account.**— Another class of claims which are subject to the rule as to notice, and which frequently call for its application, are such as grow out of mutual dealings between the original parties. In such cases a balance due one of the parties may be assigned, so as to give the assignee the same rights with respect thereto as possessed by the assignor at the time the balance was struck; but should the account be kept open, the party against whom the balance is claimed will be entitled to reduce the demand by credits in his favor as against the assignor, until notified of the assignment, but no longer.[2]

§ 444. **Policies of Insurance.**— A class of claims which frequently become the subject of assignment, either absolutely or as security for debt, are policies of insurance. These are peculiarly affected by the want of notice, as well on account of the stipulations in the policy as by reason of some points of essential difference between contracts of this kind and those of a more general character. Where, by the terms of the policy, the assured is required to give notice of its assignment, together with the transfer of the insured property, in order to save the policy from forfeiture, there is a stronger reason for enforcing this condition against the assignee than exists with reference to ordinary assignable contracts. The obligation assumed by the insurer to indemnify the assured against loss is, to a considerable extent, personal in its character. It is an obligation he might be

[1] Hackett *v.* Martin, 8 Me., 77; Matthews *v.* Houghton, 10 Me., 420; Jones *v.* Witter, 13 Mass., 304.

[2] Bartlett *v.* Pearson, 29 Me., 9.

willing to assume in favor of one person, while if the indemnity were in favor of a different person, the risk might, in the estimation of the insurer, be considerably enhanced.[1]

§ 445. **Notice to Insurer.**— Notice to the insurer of the mortgage of the insured property, and the assignment of the mortgagor's interest in the policy to the mortgagee, is required, in order that the party liable may be fully advised as to who has an interest in the indemnity. But while such notice, as in other cases of assignment, may suffice to prevent the payment of the loss, should one occur, to the assured, regardless of the rights of his assignee, it will not prevent a subsequent forfeiture of the policy, by a breach of its essential conditions on the part of the mortgagor.[2]

§ 446. **Conditions of Policy.**— So where the owner of a vessel procured insurance thereon and assigned the policy to a mortgagee, with the assent of the insurer, it was held that the assignee took subject to all the conditions of the policy, and a subsequent over-insurance by the mortgagor would render the first policy void, this being one of the conditions upon which it was issued.[3]

§ 447. **Assignment of Subject of Insurance.**— But in a case of insurance where one of the conditions of the policy was that, in case the interest in the property of the insured was conveyed without the consent of the insurer, the policy should thereby be rendered void, it was held that such forfeiture should not affect the insurance upon an interest previously conveyed or assigned with the consent of the insurer.[4]

§ 448. **By Retiring Partners.**— Where the terms of the policy prohibit an assignment without notice, an assignment by the retiring member of a partnership, to his late co-

[1] Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444.

[2] Grosvenor *v.* Atlantic Fire Ins. Co., 17 N. Y., 391.

[3] Buffalo Steam Engine Works *v.* Sun Mutual Ins. Co., 17 N. Y., 401; State Mutual Fire Ins. Co. *v.* Roberts, 31 Pa. St., 438. *Contra*, see Traders' Ins. Co. *v.* Roberts, 9 Wend., 404.

[4] Boynton *v.* Clinton & Essex Insurance Co., 16 Barb., 254.

partner, is equally within the terms of the prohibition as though it had been made to a stranger.[1]

§ **449. Notice May be Implied.**— Notice of the assignment of an insurance policy, or of an interest in the subject of insurance, need not be express. It may, like any other fact, be inferred from other facts and circumstances. So, where a retiring partner assigned his interest to his copartner, who continued the payment of the premiums to the agent of the insurer for four years after such assignment, these facts were held to be competent evidence from which the jury might draw the inference that the assignment was known to the insurer when the premiums were received, and such knowledge would dispense with any formal notice.[2]

§ **450. Assignment After Loss.**— An assignment of a policy of insurance, without notice of such assignment to the insurer, does not always work a forfeiture of the interest in the policy. This is probably true of all policies after the occurrence of the loss by which the demand is rendered absolute and unconditional. But notice of assignment after loss would be required for substantially the same reasons as apply to the assignment of other things in action. It has been held that the assignment of a policy by the assured, without notice to the insurer, left the proceeds of the policy subject to the order and disposition of the insured, and upon his becoming bankrupt, the same went to his assignees.[3]

[1] Buckley *v.* Garrett, 47 Pa. St., 204.
[2] *Ibid.*
[3] *In re* Colville, 1 Montag., 110.

IV. Notice to Carriers and Other Bailees.

§ 451. Division of the Subject.
452. Notice of Goods Delivered for Carriage.
453. Deposited at Wharf or Left at Receiving House.
454. When Notice Necessary.
455. Delivery Pursuant to Understanding.
456. Delivery on Private Wharf.
457. Stoppage *in Transitu*.
458. Inquiry Confined to Effect Upon Carriers.
459. Time of Giving Notice.
460. During Transit.
461. Before Arrival and Demand.
462. Concurrent Facts.
463. Effect of Notice.
464. End of *Transitus* by Delivery.
465. Fact of Delivery Determined by Intent.
466. Consignee's Possession Ends Transit.
467. Views of Chancellor Kent.
468. Carrier Discharged by Notice at End of Journey.
469. Storage in Government Warehouse.
470. Notice to Employer.
471. Responsibility of Carrier.
472. Effect of Assigning Bill of Lading.
473. Must be to *Bona Fide* Purchaser.
474. End of Transit by Interception.
475. Preferred to Judgment Creditor.
476. By Whom Given.
477. By Factor.
478. By Party to Contract Respecting the Goods.
479. By Owner's Guarantor.
480. By Agent.
480*a*. Notice of Facts Requiring Extra Care.
480*b*. Notice of Loss by Shippers.

§ 451. Division of the Subject.— The matter in respect to which notice affects carriers and other bailees for hire, so as to create liabilities in favor of others and against them, has reference: 1. To the delivery of the goods, wares and merchandise to be carried, or the things committed to their charge. 2. Notice of rights of others in conflict with those of consignees. 3. Notice of facts imposing the duty of extraordinary care. 4. Notice of loss by shipper.

§ 452. **Notice of Goods Delivered to Carrier.**— Circumstances beyond the control of the consignor or bailor may prevent such a direct or personal delivery of the things bailed, into the possession of the bailee, as to render it certain beyond a doubt that they are actually received. The employment of inadequate means and facilities for storage or handling of the goods, or incompetent or dishonest agents or servants, may render it extremely inconvenient, or even impossible, for the bailor to deliver the things when and where the other party is prepared to take them into his possession and receipt for them, so that there will be no room to doubt the completion of the transaction and the perfection of the bailee's liability. This branch of the law is practically applied almost exclusively to the liability assumed by carriers; but as, under the same circumstances, substantially the same rule would govern other bailees for hire, the principles here enunciated will be understood to apply in a general way to all cases of bailment.

§ 453. **Deposited at Wharf.**— When goods are deposited for transportation at a public wharf, where there is no one acting on behalf of the carrier to receive them, and there has been no previous arrangement with the carrier that leaving them at such place shall be treated as equivalent to a delivery, in order to render the carrier liable, as such, for the goods, he should have notice that they were left at the wharf for the purpose of being transported by the carrier notified.[1] But when the articles were shown to have been left at a receiving house, where the carrier was accustomed to receive parcels, and were delivered to some one in charge of the house, this was held to be the legal equivalent of actual personal delivery to the carrier himself, and the time of so leaving the goods would be the date of the inception of the carrier's liability.[2]

§ 454. **When Notice Necessary.**— When, however, from the circumstances surrounding the transaction, it is adjudged

[1] Buckman *v.* Levi, 3 Camp., 414.

[2] Burrell *v.* North, 2 Carr. & K., 680; Packard *v.* Getman, 6 Cow., 757.

necessary to give notice to the carrier that the articles have been left for him at some public place, as a wharf or landing, unless the bailor has done so in conformity to some established custom of the carrier, or a previous direction from him, either express or implied, such carrier may refuse to accept the goods at that place. It is only when the carrier, upon receiving notice, expressly or tacitly assents to such delivery, that such notice operates to create a liability to the bailor, by which the carrier would become responsible for the articles delivered.[1] Where a person, after engaging passage on a boat, left his baggage on the boat, and it was stolen, it was held that he could recover for his loss.[2] But for a trunk so left by one who had neither engaged passage nor given notice of his intention to do so, the owner could not recover as for want of care of baggage.[3]

§ 455. **Delivery Pursuant to Understanding.**— As the carrier will be bound, without express notice, by a delivery at the place indicated by custom for receiving articles for transportation,[4] by a much stronger reason would his responsibility arise from a deposit at a place where he had agreed to receive freight. Such deposit has been held to be implied notice in itself, and sufficient to fix the carrier's liability.[5]

§ 456. **Delivery on Private Wharf.**— A delivery of property for transportation on the private dock or wharf of the carrier, used exclusively by himself, would be considered as a personal delivery to the carrier, and therefore would not require notice in order to render such carrier liable from the time of the delivery.[6]

[1] *Ibid.;* Buckman *v.* Levi, 3 Camp., 414; Green *v.* The Railroad, 41 Iowa, 410.

[2] Woods *v.* Devin, 13 Ill., 746.

[3] Wright *v.* Caldwell, 3 Mich., 51.

[4] Burrell *v.* North, 2 Carr. & K., 680.

[5] Merriam *v.* H. & N. H. R. R. Co., 20 Conn., 354; Ill. Cent. R. Co. *v.* Ashmead, 58 Ill., 487; Ill. Cent. R. Co. *v.* Hornberger, 77 Ill., 457; Ill. Cent. R. Co. *v.* McClellan, 54 Ill., 58.

[6] Merriam *v.* H. & N. H. R. R. Co., 20 Conn., 354.

§ 457. **Stoppage in Transitu.**— The principal circumstance calling for notice to carriers, or other bailees, of rights to the thing bailed, adverse to those of consignee, is where the goods or merchandise carried is stopped *in transitu* by the vendor. The event which calls for the exercise of the vendor's right of stoppage *in transitu* is when the goods purchased have not been paid for, and the purchaser has become insolvent.[1] The usual manner of stoppage is by a countermand to the carrier while the goods are still, in contemplation of law, in transit; but this seems not indispensable to the main purpose for which the right is asserted. The object of such countermand is not merely to affect the carrier with notice of the right asserted, and thus implicate him, upon his refusal to comply. The chief end to be attained is to affect the consignee with notice through the carrier, and this may in some instances be accomplished by an open and notorious assertion of the right of reclamation in any other form. A countermand of the consignee's right to receive the goods will have the same effect to prevent the loss of the vendor's right of stoppage *in transitu*, as though the carrier were notified not to deliver them.[2] As, in the case cited, where the bills drawn against the shipment were protested, and the consignor notified the assignees of the consignee of the fact, and proposed that they should either be delivered to his own agent to await the fate of the bills, or that the assignee should keep a separate account of sales, and, in the event of the acceptance of the latter alternative, prospectively demanded the proceeds as his property, this was held a distinct enunciation of the vendor's right of stoppage, and was therefore sufficient to bind the assignee.[3]

[1] Benj. on Sales, §§ 766, 837.

[2] Bell *v.* Moss, 5 Whart., 189.

[3] The vendor's right of stoppage does not depend upon his having given formal notice, as he may have his action to recover the goods in the first instance. Reynolds *v.* The Railroad, 43 N. H., 580; Newhall *v.* Vargas, 13 Me., 93; Howe *v.* Stewart, 40 Vt., 145; O'Brien *v.* Norris, 16 Md., 122; Thompson *v.* The Railroad, 28 Md., 396; Jones *v.* Earl, 37 Cal., 630.

§ 458. **Inquiry Confined to Effect Upon Carriers.**— But how interesting and profitable soever a general inquiry into the origin, nature and objects of this important right, which is recognized by all commercial peoples, might prove, it is only intended here to present so much as affects the carrier in whose hands the goods are stopped at the instance of the vendor. Anything more than this would be beyond the legitimate scope of a work of this kind.

§ 459. **Time of Giving Notice.**— One of the most important matters for consideration in connection with this subject is the question, when, in the course of the shipment, must the notice be given, in order to fix the liability of the carrier to the consignor or vendor? It is not a sufficient answer to this to say that it should be before the arrival of the goods at their destination, nor even that it should be prior to the delivery. It may be given after their arrival at the place were they are to be delivered, and the right of stoppage may be lost before their actual delivery to the consignee.[1]

§ 460. **During Transit.**— It may be laid down as a general rule, that notice to a carrier of the vendor's intention to reclaim, by a countermand of the order for the delivery of the goods shipped, will be in time, if given while the goods are still in transit.[2] This requires a determination of the question, when does the transit cease? Certainly not in every instance with the end of the voyage. It cannot properly be said to continue merely during the time intermediate between the actual commencement of the journey from the place where the goods are sold, to the place where they are to be delivered. Such a construction would exclude all the time intervening between the delivery of the goods to the carrier, and their actual departure, as well as the time subsequent to their arrival, and prior to acceptance by the consignee. It may be said, therefore, that the goods are in transit, and subject to the right of stoppage *in transitu*,

[1] Mottram *v.* Heyer, 5 Den., 629. See, also, cases cited *infra.*
[2] *Infra.*

from the time the carrier becomes charged with their possession, until his liability as carrier terminates.[1]

§ 461. **Before Arrival and Demand.**— In accordance with this view it has been held that the notice to the carrier must be before the arrival of the goods at their destination and a demand therefor by the consignee or his legal representative.[2]

§ 462. **Concurrent Facts.**— The doctrine that, in order to defeat the right of stoppage *in transitu*, the arrival at the place of destination and the demand by the consignee must be concurrent facts, though not fully settled, is well illustrated by the case of Holst *v.* Pownal.[3] It was there laid down by Lord Kenyon, that, in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by him on the completion of the voyage, and that, in that case, the voyage was not completed until the carrier had performed quarantine. In this opinion the court of king's bench concurred, and the verdict was entered up for plaintiff, the vendor, whose agent had claimed the cargo before the completion of the quarantine, notwithstanding the consignee's prior possession; but perhaps the weight of authority is in favor of the right of the vendee to anticipate the termination of the voyage at any point, and, by obtaining possession, put at end to the *transitus*.[4] But this has been qualified by the provision that the interruption of the transit by the purchaser shall be in good faith.[5]

§ 463. **Effect of Notice.**— From the foregoing it will appear that the notice of stoppage given to the carrier is not only sufficient to fix his liability, as for conversion of the goods, in case he allows them to be taken while the

[1] *Infra.*

[2] Bird *v.* Brown, 14 Jur., 132.

[3] 1 Esp., 240.

[4] Whitehead *v.* Anderson, 9 M. & W., 518; Lond. & N. W. R. Co. *v.* Bartlett, 7 H. & N., 400: Wood *v.* Yeatman, 15 B. Mon., 270; Foster *v.* Frampton, 6 B. & C., 107; Mohr *v.* Boston & Albany R. R. Co., 106 Mass., 67.

[5] Mohr *v.* B. & A. R. R. Co., *supra.*

seller's right of control remains intact, but that it is sufficient to vest the right of possession in the original owner, so that he may reclaim the goods from an insolvent or bankrupt consignee or his assignees.[1] The possession obtained by the consignee, in order to work a complete divestiture of the seller's rights with respect to the property, if not required to be regular, in the sense that it is acquired at the end of the voyage, should at least be rightful, in the sense that it was obtained with the seller's consent and not against his protest. Thus, where the notice was given the owners of canal boats at one of the termini of the route, and in transmitting instructions, pursuant to such notice, to the place of destination, a mistake was made by the carrier in the names of the consignees, this was held not to affect the seller's right of reclamation, after the goods had, in consequence of the mistake, been delivered to the purchaser, the notice having been given before the transit was completed.[2]

§ **464. End of Transitus by Delivery.**—In many of the cases the *transitus* is held to be at an end only with the delivery of the goods to the consignee, his agents or representatives.[3] And in order to avoid the consequences of following this rule strictly in certain cases, where it seemed that actual delivery should not be required, the doctrine of constructive delivery is resorted to.[4] While in Bird *v.* Brown,[5] it is maintained with a fair show of reason that the *transitus* may be ended without delivery either actual or constructive, by a simple demand for the goods by the purchaser or his representatives, although possession is tortiously withheld by the carrier, and that a subsequent notice

[1] White *v.* Welsh, 38 Pa. St., 396; O'Neil *v.* Garrett, 6 Iowa, 480; Rowley *v.* Bigelow, 12 Pick., 307.

[2] Litt *v.* Cowley, 7 Taunt., 169; Bell *v.* Moss, 5 Whart., 189.

[3] Foster *v.* Frampton, 6 Barn. & Cres., 107; Buckley *v.* Furniss, 15 Wend., 137; Seymour *v.* Newton, 105 Mass., 272; Sawyer *v.* Joslin, 20 Vt., 172; Newhall *v.* Vargas, 13 Me., 93; Hays *v.* Monille, 14 Pa. St., 48; Aguirre *v.* Parmelee, 22 Conn., 473.

[4] Jordon *v.* James, 5 Ohio, 98; Sawyer *v.* Joslin, 20 Vt., 172.

[5] *Ante*, § 461.

of stoppage would not be effectual.[1] But even where this is accepted as the correct doctrine, it must be qualified by the provision that nothing further remains to be done before the notice of stoppage, in order to entitle the purchaser to the possession of the goods. Thus, where the buyer having become bankrupt after the purchase and before the arrival of the goods, his assignee demanded them and went on board the vessel and laid his hands upon a portion of the articles purchased, and the master of the vessel promised to deliver them when he was satisfied as to his freight. Before the freight was paid the vendor went on board and gave notice of stoppage to the officer in charge, and it was held that, as the master had not contracted to hold as the agent of the assignee, the *transitus* was not ended and the notice of stoppage was sufficient.[2] But it has been strongly intimated that the mere non-payment of the freight, where the goods are held subject to the orders of the consignee and to be delivered upon payment, will not render the goods liable to stoppage *in transitu*.[3]

§ 465. Fact of Delivery Determined by Intent.— The conflict of authority is too decided to admit of the deduction of a rule as to what acts on the part of the purchaser, without the concurrence of the carrier, will suffice to cut off the vendor's right of stoppage. But it is quite clear that where possession, actual or constructive, is required, the fact must be determined by the manifest intent of the parties with respect to the property, and their conduct must be interpreted by what it was meant to signify in each par-

[1] Secomb *v.* Nutt, 14 B. Mon., 324; London, etc., R'y *v.* Bartlett, 7 H. & N., 400; Turner *v.* The Liverpool Dock Tr's, 6 Exch., 543; Stubbs *v.* Lund, 7 Mass., 453; Holbrook *v.* Vose, 6 Bosw., 76.

[2] Whitehead *v.* Anderson, 9 M. & W., 518. See, also, Calahan *v.* Babcock, 21 Ohio St., 281; Guilford *v.* Smith, 30 Vt., 49; Blackb. on Sales, 259; Benj. on Sales, § 855; Jackson *v.* Nichol, 5 Bing. N. C., 508; McFetridge *v.* Piper, 40 Ia., 627; Buckley *v.* Furniss, 15 Wend., 137; Cabeen *v.* Campbell, 30 Pa. St., 254; Harris *v.* Pratt, 17 N. Y., 249; Allen *v.* Mercier, 1 Ash., 103.

[3] Whitehead *v.* Anderson, *supra.*

ticular case, rather than by the construction placed upon similar acts in other cases where the intention may have been quite different.[1] The intention of the insolvent purchaser not to accept was held to control, although such intent was never disclosed until after notice of stoppage.[2]

§ 466. **Consignee's Possession Ends Transit.**— Although it may be true that possession by the consignee is not requisite, in all cases, to defeat the vendor's right in the premises, it is nevertheless equally true that, when such possession has been obtained by the purchaser in good faith, the transit will be at an end. In order to arrive at a just conclusion as to the conflicting rights of the vendor and vendee, it will be necessary to follow the inquiry farther than our present purposes require. Although the vendor's right of stoppage may still attach after the goods have passed out of the possession of the carrier, for the reason that they have not been accepted by the insolvent purchaser, or by any one authorized to act for him;[3] still, if the carrier's duties with respect to the goods have ceased, he cannot be affected by notice or countermand from the vendor.[4]

§ 467. **Views of Chancellor Kent.**— In giving a summary of the authorities upon this subject, and the deductions to be drawn therefrom, Chancellor Kent lays it down as a general rule that where the carrier is, by agreement, converted into a special agent of the buyer, the transit of the goods terminates, and with it the right of stoppage.[5]

§ 468. **Carrier Discharged by Notice at End of Journey.**— It would follow, therefore, that where the carrier has

[1] Benj. on Sales, § 857, and cases cited.

[2] James *v.* Griffin, 2 M. & W., 623. See, also, Morris *v.* Shryock, 50 Miss., 590.

[3] Bolton *v.* Lanc. & York. R'y Co., L. R., 1 C. P., 431; 35 L. J., C. P., 137; Grout *v.* Hill, 4 Gray, 361; Lane *v.* Jackson, 5 Mass., 157.

[4] Isley *v.* Stubbs, 9 Mass., 65; Reynolds *v.* B. & M. R. R., 43 N. H., 591; Cabeen *v.* Campbell, 30 Pa. St., 254; Hoover *v.* Tibbits, 13 Wis., 79; Harris *v.* Pratt, 17 N. Y., 249; Sturtevant *v.* Orser, 24 N. Y., 538.

[5] 2 Kent, Com., 545.

completed the journey, given notice of the arrival of the goods, and, by the lapse of a reasonable time for their removal, has ceased to be responsible for them as carrier, whatever may be the rights of the vendor with respect thereto, the carrier having renounced all control over them, could not be rendered liable to the vendor by a failure to respect his notice of stoppage.

§ **469. Storage in Government Warehouse.**— A common instance of the termination of the transit so far as it affects the carrier, while it still continues so far as necessary to give the vendor the right to perfect his lien by repossessing the goods, is where they have arrived at the port or place of destination and are stored in a public warehouse in default of payment of the duties. In such event they are not considered to have come to the possession or subject to the control of the vendee in any sense that would deprive the vendor of his right of repossession, although notice to the carrier would not be effectual.[1] The notice or order, to be effective for the purpose of binding the carrier or other bailee, should be given to the person actually in possession pursuant to the bailment, or to his employer.[2]

§ **470. Notice to Employee.**— Notice to the owner of a vessel, or other employer of the one who has immediate custody or control of the goods, in order to be binding, must be given in time to allow of the transmission of orders to the master of the vessel or other employee, before the termination of the *transitus*.[3] To hold otherwise would be to require the employer, in order to escape liability, to perform that which is impossible. The most that can be justly required in any case is that due diligence shall be used to communicate with the officer or servant in possession of the goods.

[1] 2 Kent, Com., 547; Donath *v.* Broomhead, 7 Pa. St., 301; Mottram *v.* Heyer, 5 Den., 629; Northey *v.* Field, 2 Esp., 613.

[2] Mottram *v.* Heyer, *supra.*

[3] Id.; Whitehead *v.* Anderson, 9 M. & W., 518; Litt *v.* Cowley, 7 Taunt., 169.

§ 471. **Responsibility of Carrier.**— It is of the utmost importance that the carrier act circumspectly upon receipt of a notice of this sort, as in delivering or withholding the goods after notice from the vendor he acts at his peril.[1] The difficulties of his position may be inextricably complicated by the controversy between the vendor and the vendee. To deliver the goods when the notice is sufficient renders him liable to the vendor. Should he wrongfully withhold them from the vendee or his representatives, he becomes responsible for his conduct, although he may have acted on the belief that the stoppage was complete.[2]

§ 472. **Effect of Assigning Bill of Lading.**— The additional obstacle to a clear understanding of his duties in the premises is presented in the fact that the vendor's right of stoppage may be utterly defeated by the vendee. When the goods are represented by a bill of lading, this is regarded as such a symbol of property, in the hands of the vendee, that an assignment thereof by him to an innocent purchaser for value will give to such purchaser a right to the property, which is paramount to any rights the vendor may have to reclaim possession of the same for unpaid purchase money.[3]

§ 473. **Must be to Bona Fide Purchaser.**— But in order to give such a transfer of a bill of lading by the insolvent vendee the effect of cutting off the right of the vendor to perfect his lien for the purchase money by stoppage *in transitu*, it must be assigned to one who comes strictly within the description of assignees whose rights are protected, not only because of the *bona fides* of the transaction, in the sense that he took without knowledge or information of the rights of the vendor, but it must be for a valu-

[1] The Tigress, 32 L. J., Adm., 97; S. C., 9 Jur., N. S., 361.

[2] Wilson *v.* Anderton, 1 B. & Ad., 450; Batuitt *v.* Hartley, L. R., 7 Q. B., 594; Blackburn on Sales, 266.

[3] Blanchard *v.* Page, 8 Gray, 281; Holbrook *v.* Vose, 4 L. Reg., N. S., 602. And such assignee may maintain an action against the seller who regains possession for the conversion of the goods. Rowls *v.* Deshler, 4 Abb. App. Dec., 12; Newhall *v.* Cent. Pac. R. Co., 51 Cal., 345.

able consideration.[1] Thus, where a bill of lading of goods in transit was transferred by the purchaser to a creditor, as collateral security for past indebtedness, it was held by Mr. Justice BRADLEY, in Lesassier *v.* The Southwestern,[2] that, as the transferee had given up nothing as a further consideration for the transfer, it was not such an assignment as would preclude the seller from stopping the goods for the unpaid purchase money, in case of the insolvency of the purchaser.

§ 474. **End of Transit by Interception.**— Although the *transitus* may be ended by the purchaser himself before the arrival of the goods at the port of delivery, by meeting them at an intermediate point, and though he may defeat the vendor's lien by assignment of the bills of lading, the arrival may not be anticipated, nor the right of stoppage defeated, by the general creditors of the purchaser. Accordingly, where, after the arrival of the goods, they were placed on a wharf boat, and the purchaser, being aware of his insolvency, refused to accept them, and so informed the vendor, and while thus situated the goods were attached at the suit of a creditor, it was held that the vendor might exercise his right of stoppage, notwithstanding the attachment.[3]

§ 475. **Preferred to Judgment Creditor.**— For the same reasons that the claim of the vendor for unpaid purchase money would be preferred to that of the attaching creditor, it is held that a seizure by an officer under process in favor of a judgment creditor will not defeat the right of stoppage by the vendor.[4]

§ 476. **By Whom Given.**— An important matter for consideration in connection with the liability which may be created against carriers or other bailees, by notice of the vendor's claim, is as to the party who makes the claim and gives the notice. The countermand, when addressed to the

[1] Lesassier *v.* The Southwestern, 2 Woods, 35.
[2] *Supra.*
[3] Morris *v.* Shryock, 50 Miss., 590.
[4] Rucker *v.* Donovan, 13 Kans., 251.

custodian of the property, unless coming from one possessed of rights in the premises, must be disregarded.[1] On the other hand, if given by one recognized by the law as entitled to repossess the goods for his indemnity by means of a stoppage *in transitu*, such notice, if otherwise sufficient, cannot be ignored. In this respect, as in every other, the carrier acts at his peril. The duty of the carrier would be sufficiently plain if the right existed only in favor of actual vendors; but it has been repeatedly held that it may be exercised with the same effect by any one who stands in the place of such vendor, with respect to the demand upon the purchaser.

§ 477. **By Factor.**— It was accordingly held by Lord Ellenborough in Feise *v.* Wray,[2] that the right existed in favor of a mere factor. In that case the consignor had bought the goods with his own funds in a foreign port, on account, and by order of his principal in London, to whom they were shipped. The principal becoming bankrupt during the transit, and the assignee demanding the possession of the goods in the interest of the estate, contended that the factor who purchased the goods did so in his capacity of agent; but the court in the interest of justice chose to consider him as a vendor, who sold the goods to his London correspondent at cost, plus his commissions.[3]

§ 478. **By Party to Contract Respecting the Goods.**— So where the vendor has merely an interest in an executory contract with respect to the goods in transit, as in the case of Jenkins *v.* Usborne,[4] where the plaintiff sold a portion of a cargo, the property in which had not yet vested in him, but he merely would have a right to the designated portion after it was separated, this interest was held to be such,

[1] Hutchinson on Car., § 411.

[2] 3 East, 93.

[3] Seymour *v.* Newton, 105 Mass., 272; Newhall *v.* Vargas, 13 Me., 93; Gossler *v.* Schepeler, 5 Daly (N. Y.), 476; Frascheris *v.* Henriques, 6 Abb. (N. S.), 251; Snee *v.* Prescot, 1 Atk., 245; The Tigress, 32 L. J., Adm., 97; Ellershaw *v.* Magniac, 6 Exch., 570.

[4] 7 M. & G., 678.

that on the insolvency of his vendee he was entitled to stop the delivery for the unpaid purchase money.

§ 479. **By Owner's Guarantor.**— The recent case of Gossler *v.* Schepeler[1] was where the goods were purchased in a foreign port upon the faith of a letter of credit, from the party claiming the right of stoppage. The purchaser had agreed to transfer the bills of lading to his guarantor, as security, but failed to comply with his contract. During the transit the purchaser became bankrupt, and the exercise of the right by the guarantor was allowed by the court, as against the claim of the assignee in bankruptcy for the possession of the goods, upon the ground that he had paid the purchase price, and was thereby subrogated to all the rights of an original vendor. In deciding this case, one of the principal authorities cited in support of the right of the party assuming the payment of the purchase money, to stoppage for his own security, is Benjamin on Sales.[2] It is there laid down that such right could be claimed under the provisions of the statute,[3] by a surety who had paid the vendor; but a case is cited prior to the statute,[4] in which it was decided that a mere surety for the buyer had no right to stop *in transitu.*

§ 480. **By Agent.**— Stoppage may be made by an agent, on behalf of the principal, whether he has been thereto specially authorized, or acts pursuant to general authority derived from the nature and scope of his employment.[5] And such authority, where it is special, may be derived from subsequent ratification, as well as from prior appointment,[6] subject, however, to the provision that, in order to

[1] 5 Daly, 476.

[2] *Infra,* §§ 830, 831.

[3] 19 and 20 Vict., c. 97.

[4] Skiffen *v.* Wray, 6 East, 371.

[5] Reynolds *v.* B. & M. R. R., 43 N. H., 580; Bell *v.* Moss, 5 Whart., 189; Whitehead *v.* Anderson, 9 M. & W., 518; Chandler *v.* Fulton, 10 Tex., 2.

[6] Hutchings *v.* Nunes, 1 Moore, P. C., N. S., 243.

operate as a justification of the carrier's act in withholding the goods from the purchaser, or to render him liable for not respecting the countermand, such subsequent approval must be prior to the termination of the *transitus*.[1]

§ 480a. **Notice of Facts Requiring Extra Care.**—The care to be used in handling goods delivered to a common carrier for transportation must depend in no small degree upon the nature of the goods consigned. It is also essential, where the goods are of a kind that demand extraordinary care in handling, that the carrier should have notice of this fact, in order to render him liable for any injuries resulting from a want of such care. When the articles consigned bear plain and legible marks indicating their peculiar qualities, or the contents of packages, the carrier will be sufficiently notified for all purposes affecting his liability.[2] But where the quality of the article shipped is obvious, and it may be readily distinguished from other grades of the same article, notice of this difference, or of any different use for which it was intended, is unnecessary, in order to render the carrier liable for the loss occasioned by handling. Thus where plaintiff shipped a selected car load of corn in the ear, to be sold as seed corn, and the carrier caused it to be shelled, whereby it deteriorated in value, it was held that defendant was not entitled to notice of the peculiar value possessed by corn in the ear for seed purposes. The use to which it was to be put was not of an extraordinary character, and hence the carrier could be held for the difference in price which seed corn would bring for this purpose, as well as another.[3]

An extraordinary application of the general doctrine that the carrier is entitled to notice of the peculiar condition of a passenger, to create liability for damages resulting from a want of the extra care that such condition required, is made

[1] Bird *v.* Brown, 4 Exch., 786.

[2] Hastings *v.* Pepper, 11 Pick., 41; Mechanics', etc., Bank *v.* Gordon, 5 La. An., 604.

[3] Missouri Pac. R'y Co. *v.* Nevin (Kansas), 2 Pac. Rep., 795.

in Pullman Palace Car Co. *v.* Baker.[1] The facts of the case were that plaintiff, a married woman, was traveling on one of defendant's sleeping cars, which in consequence of defective construction caught fire. In order to avoid burning to death she was compelled to leave her berth and the car in her night clothes, and in her bare feet. She was in a normal state of health, but it happened during her period of menstruation, and in consequence of the exposure the flow of the menses was arrested, producing serious and permanent injury. There was no question but that defendant was negligent in permitting the car to take fire. Nor was there any pretense that the natural state of health of plaintiff contributed in any way to the burning of the car, nor that she was to be regarded as negligent for being in that condition at that particular time. The court seemed to regard her as a sick person, and compared her state of health to that of a person with a *cut foot*. The conclusion was that she could not recover, for the reason that she did not give notice to the company of her condition, presumably to the end that it would have taken extra precautions against fire, or might have given her timely notice of the conflagration, or would have furnished her a safe and comfortable retreat where she would not have been exposed, in her bare feet, to the inclement weather.[2]

§ 480b. **Notice of Loss by Shippers.**— The necessity for any special notice of a claim for damages must be one which arises out of the contract with the carrier. But even where such notice is stipulated for, the contract will receive a reasonable construction, and the liability may be fixed by a substantial compliance with the terms of the contract. Thus when cattle were received for transportation, under a contract that "no claim for loss or damage on live stock will be allowed unless the same is made in writing, before

[1] 4 Colo., 344.

[2] I am not aware of a single instance where this valuable addition to the law governing common carriers has been cited with approval. It has probably been overlooked.

or at the time the stock is unloaded," and verbal notice of a claim for injury at the time of unloading, and written notice three days after, were given, and received by the company without objection as to form or time, it was held a substantial compliance with the contract, and the company's liability was fixed thereby.[1]

[1] Rice *v.* K. P. R'y, 63 Mo., 314.

V. Notice of Suit in Ejectment, to Warrantor.[1]

§ 480c. The Remedy Which Depends on the Notice.
480*d*. The Form and Sufficiency of Notice.
480*e*. Waiver of Notice.
480*f*. By Whom the Notice Should be Given.

§ 480c. The Remedy Which Depends on the Notice.— One of the most important of the ancient covenants in a deed was that of warranty, whereby the grantor of the freehold and his heirs were bound, either upon voucher or by judgment in a writ of *warrantia chartæ*, in case of eviction of the grantee or his heirs by paramount title, to yield other lands of equal value.[2] But the heir of the warrantor was bound only on condition that he held, as assets, other lands of equal value by descent. Warranty was of two kinds: *Lineal* and *collateral*. The former was where the heir derived title, either from or through the ancestor who made the warranty; the latter was where the warranty barred the heir from claiming the land by any collateral title, although his own was not derived from the warranting ancestor, upon the presumption that he might thereafter have assets by or through the ancestor.

One of the incidents of the ancient remedy of *warrantia chartæ* was that when the warrantor was "vouched," as the process of summons was called, and judgment obtained against the tenant who was evicted, judgment in favor of the latter was entered at the same time against the warrantor. By the civil law, as adopted in the state of Louisiana, if the purchaser by warranty deed fails to cite his vendor or warrantor, the latter cannot be held liable for the costs and damages resulting from defending the action. By the Spanish law, the vendee who failed to cite his vendor in warranty lost all recourse on him.[3]

[1] For the suggestion of this subject as a branch of the law of notice, the author cheerfully acknowledges his indebtedness to Hon. James O. Pierce of Tennessee. See 6 South. Law Rev., 719.

[2] Coke on Litt., 365; 4 Kent, Com., 468.

[3] Delacroix *v.* Cenas, 20 Martin (La.), 356.

The remedy by ancient warranty never gained a practical foothold in the United States, and is, by statute, shorn of some of its incidents upon which much learning and subtlety have been wasted. The modern covenant of warranty still possesses a semblance of the qualities of the ancient remedy. But instead of the summons, the warrantor, in case of a suit against his grantee, immediate or remote, is served with a notice. In case of his failure to appear in response to notice, or in any event, the judgment against his grantee becomes conclusive, not only in favor of the plaintiff in that action, but in favor of the defendant, when the latter sets up the paramount title by which he was evicted, in an action on the covenant of warranty.[1] But the rule is, at least in the common law states, that the party sued in ejectment loses no right of action against the warrantor by a failure to serve the latter with notice.[2] The effect of such failure is merely to leave the question of paramount title open to contest in the action on the covenant. The warrantor is not concluded by the judgment against his grantee.[3] He is still at liberty to defend the action on the covenant of warranty, by contending that his title was perfect; whereas, if he has been properly notified of the action against his grantee, there will be little beyond the measure of damages for the evicted party to prove when he sues for breach of covenant of warranty.[4] The measure of damages is generally the price paid for the land by the evicted party, with interest and costs.[5] But in

[1] Rawle on Covenants, 218; Miner *v.* Clark, 15 Wend., 425; Greenlow *v.* Williams, 2 Lea, 533.

[2] King *v.* Kerr, 5 Ohio, 154; Claycomb *v.* Munger, 51 Ill., 378.

[3] Rawle on Covenants, 232.

[4] Chamberlain *v.* Preble, 11 Allen, 370; Cooper *v.* Watson, 10 Wend., 205; Turner *v.* Goodrich, 26 Vt., 708; Hinds *v.* Allen, 34 Conn., 195; Pitkin *v.* Leavitt, 13 Vt., 379; Poul *v.* Witman, 3 Watts & Serg., 409; Chapman *v.* Holmes, 10 N. J. L., 20; Wimberly *v.* Collier, 32 Ga., 13; Boyd *v.* Whitfield, 19 Ark., 447; Wendel *v.* North, 24 Wis., 223.

[5] Pitcher *v.* Livingston, 4 Johns., 1; Marston *v.* Hobbs, 2 Mass., 433; Talbot *v.* Bedford, Cooke (Tenn.), 447; Lowther *v.* The Commonwealth, 1 Hen. & Munf., 202; Stout *v.* Jackson, 2 Rand., 132; Bennet *v.* Jen-

some cases it has been decided to be the value of the land at the date of eviction.[1]

The principle upon which this notice operates conclusively upon the warrantor is that, upon being informed of the pendency of the action to try the title of land which he has warranted, he has an opportunity to appear and defend the same, or at least furnish the covenantee the means of making such defense, and if he sees proper to stand by, and, for want of the evidence which it was his duty to supply, suffer judgment to pass against his grantee, he shall not be heard to question the judgment by which the latter was evicted.[2] And the warrantor is even held to be thus estopped by notice, though the plaintiff in the action on the warranty, in order to save himself from eviction, has been forced to purchase the outstanding paramount title.[3] The notice is also held to have the same effect when the suit is brought by the covenantee to recover possession of the land purchased with warranty.[4]

§ 480d. The Form and Sufficiency of the Notice.— No particular form of words is essential to render the notice binding upon the party served. Its matter must be governed by the purpose which it is intended to subserve. But in every case it must be sufficiently certain and explicit to convey to the mind of the party notified that the purchaser has been sued by one claiming to hold the paramount title adverse to the grantor, and that the latter is required to defend the suit.[5] Whether it should be written or verbal

kins, 13 Johns., 50; Cox *v.* Strode, 2 Bibb, 273; Sheets *v.* Andrews, 2 Blackf., 274.

[1] Gore *v.* Brazier, 3 Mass., 523; Caswell *v.* Wendell, 4 Mass., 523; Sweet *v.* Patrick, 3 Fairf., 1; Sterling *v.* Peet, 14 Conn., 245; Park *v.* Bates, 12 Vt., 381; Bissell *v.* Erwin, 13 La., 143.

[2] Lisk *v.* Woodruff, 15 Ill., 15; Chamberlain *v.* Preble, 11 Allen, 370.

[3] McConnell *v.* Downs, 48 Ill., 271; Lisk *v.* Woodruff, 15 Ill., 15.

[4] Brown *v.* Taylor, 13 Vt., 637; Gragg *v.* Richardson, 25 Ga., 570; White *v.* Williams, 13 Texas, 258. The fact that the land to which the grantor had no title was inadvertently included in the warranty deed was held to be a good defense to an action on the covenant. Steward *v.* Hadley, 55 Mo., 235.

[5] Paul *v.* Witman, 3 Watts & Serg., 410; Rawle on Cov., 232.

is not definitely settled by a very imposing array of authority; but if otherwise sufficient may always be in writing. So far as the authorities examined determine the question, however, it will answer the purpose equally well if communicated verbally.[1] But the notice, to be sufficient in point of time, should be given so long before the trial of the issues that the grantor may have an opportunity to present his title. He should probably have the same right to delay the trial, upon a proper showing, as though he were defending as a party to the action.[2]

§ 480e. Waiver of Notice.— The effect of this notice not being greater than that of service of original process, it may be waived by the appearance of the warrantor and his participation in the defense. The object of the notice is that he may have this opportunity, and where he avails himself thereof, upon informal notice, he stands in the position of a defendant who voluntarily appears. He is not, it is true, a party to the record, but neither does he become a party to the judgment. But he is present for all the purposes intended by the notice, and his rights may be affected by the judgment to the same extent as though he had been specifically notified of the suit.[3]

§ 480f. By Whom the Notice Should be Given.— The partial analogy between the notice served upon the warrantor and the process served upon a party defendant does not render it essential that the former should be served by an officer, or by one who would be competent to serve a summons in the case. But though it be of little importance by whom the notice is *served*, it is of considerable importance by whom the notice is *given*. The notice should proceed from the warrantee or party relying on the covenant.[4] But whether the notice, in order to render the judgment conclusive, should be directly from the defendant to a remote grantor, or whether it might not be equally effective

[1] Somers *v.* Schmidt, 24 Wis., 417; 1 Am. Rep., 191.
[2] Davis *v.* Wilbourne, 1 Hill (S. C.), 28; Greenlow *v.* Williams, 2 Lea, 539.
[3] Chamberlain *v.* Preble, 11 Allen, 373.
[4] Somers *v.* Schmidt, 24 Wis., 417.

if given by the immediate grantor of the defendant, is not so clear.

It has been ably argued that for the reason that the effect of the judgment, when relied upon as conclusive evidence of the paramount title, and hence of the breach of warranty, operates by way of estoppel, the principle that estoppels should be mutual would render notice from an intermediate warrantor nugatory; that "the estoppel results from the operation of the notice, as an equivalent to process, in making the covenantor a *quasi* party;" and that it would seem contrary to established analogies to allow one party the benefit of evidence created in a transaction between himself and another, when he is seeking to enforce a right against a third party.[1] It is true that the effect of the notice is to make the question of paramount title *res judicata*, although the judgment was rendered in a suit between other parties. But it has this effect, regardless of the person who gives the notice. The question, as stated by Judge Pierce, in the Southern Law Review, is where A. conveyed to B., and B. to C. by covenant of general warranty, and D. brings his action against the latter, who gives notice to B., and B. to A., whether C., in an action against A., after judgment of eviction, may have the benefit of the judgment as conclusively establishing the breach of the latter's covenant. It is not questioned that the notice served upon B. would have this effect in an action against him, nor that it would have been equally effective against A. had he been notified by C. instead of by B. This is a question that can hardly be decided upon the supposed analogy which the notice bears to process by which one is made a party to the judgment. The means are too dissimilar, and the ends aimed at, too widely different. The condition of a warrantor, whether mediate or immediate, when thus affected by a judgment against his warrantee, is unique. Yet it is precisely what he bargained for. The notice is not necessarily

[1] Hon. James O. Pierce, in 6 South. Law Rev., N. S., 719, 728. Citing Petrie *v.* Nuttall, 11 Exch., 569.

a matter of record; nor is judgment entered against the warrantor. It is not technical notice that he is entitled to, but actual, specific, timely information, that should proceed from the party interested in bringing the matter to his attention. The object of the notice is to afford the covenantor an opportunity to appear and show that his deed passed a good title, and hence that there is no breach of warranty. It is difficult to comprehend why the purpose of the notice and its authenticity are not as well preserved when it comes from C. through B. to A. as though it went from C. to A. direct. If a negotiable promissory note is dishonored in the hands of the holder, each indorser is as effectually bound by notice from his immediate indorsee, where information of the fact is communicated from one to the other, as though all were directly notified by the holder of the note.[1] It is none the less notice from the party who relies upon the covenant merely because it has been transmitted through an intermediate party equally interested in conveying the notice to the original warrantor.

For the foregoing reasons the writer feels constrained to take a different view of this question from that laid down by the learned writer who has called attention to this branch of the subject. The right to claim the benefit of the notice should be enjoyed by the warrantee who has been evicted, as against any prior warrantor who has received notice of the suit from an intermediate warrantor, who in turn has been notified by the party evicted.

If the question were one of principle, entirely uncontrolled by authority, it would not be going too far to say that if the warrantor had certain and specific knowledge or information from any reliable source, or by any means, that the action was pending, and he had sufficient opportunity to defend his title, he would be concluded by the judgment when sued by any subsequent warrantee.

[1] *Post*, § 795.

VI. Notice by Which Liability for Tort May be Fixed.

§ 480*g*. The Liability of Municipal Corporations for Nuisance — Failure to Keep Highway in Repair.
480*h*. Notice to Abate Nuisance.
480*i*. Dangerous Animals.
480*k*. Notice of Dangerous Condition of Machinery — Misconduct of Employees, etc.

§ 480g. The Liability of Municipal Corporations for Nuisance — Failure to Keep Highway in Repair.—"For taking, or refusing to take, strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporations or to the state."[1] Nevertheless there is a class of duties imposed upon municipal corporations which they owe not only to their own citizens, but to other individuals as well. Thus it is generally recognized as the duty of a town or city to keep in repair the streets and sidewalks of which it assumes control. As a consequence of this duty to individuals, it may become liable to those injured by a failure in its faithful discharge.[2] But this liability is of statutory creation, and is subject to certain conditions.[3] In an action against a town, to recover damages for an injury sustained from a defect in a public highway, it must be shown that the authorities had notice of the defect, prior to the injury.[4] Yet where an injury was received from the giving way of a bridge, the keeping in repair of which was by statute im-

[1] Cooley on Torts, 620.

[2] Cooley on Torts, 625; Munson *v.* Town of Derby, 37 Conn., 298; 9 Am. Rep., 332.

[3] Town of Waltham *v.* Kemper, 55 Ill., 346; 8 Am. Rep., 652; White *v.* County, 58 Ill., 297; 11 Am. Rep., 65; Young *v.* Commissioner, etc., 2 Nott & McC., 537; Mower *v.* Leicester, 9 Mass., 247; Perry *v.* John, 79 Pa. St., 411; Niles *v.* Martin, 4 Mich., 557; Detroit *v.* Blakely, 21 Mich., 84; State *v.* Cumberland, 7 R. I., 75; Sutton *v.* Board of Police, 41 Miss., 236; Huffman *v.* San Joaquin Co., 21 Cal., 426; Barbour Co. *v.* Horn, 48 Ala., 649; Cooley on Torts, 622.

[4] Goodnough *v.* Oshkosh, 24 Wis., 549; 1 Am. Rep. 202.

posed upon the municipal corporation, it was held that though the defect was a latent one which could not be discovered by skilled persons employed by the corporation, the corporation was liable.[1]

The fact of notice to the controlling authorities need not in every instance be established by evidence of express notice or positive personal knowledge of the defect complained of, as it may be presumed where it has existed for a considerable length of time prior to the injury, and must have been detected by the officers of the municipality in the ordinary discharge of their duties.[2] Thus, where a traveler was injured, without fault or negligence on his part, in consequence of the removal of some planks from a bridge, a city that was bound to keep the bridge in repair was held liable, though no actual notice of the defect had been given, sufficient time having elapsed prior to the injury to render the defective condition of the bridge a matter of notoriety.[3] But whether notice to the municipality can be inferred from the lapse of time is a question for the jury, and cannot be laid down in any case as a conclusion of law.[4]

In order to render the corporation liable it is not essential that the immediate cause of the injury of which it has notice shall be a defect in the highway which has been condemned or formally dedicated to public use. Thus, where plaintiff was passing along a street which the city was bound to keep in repair, and, in order to avoid the kick of a mule, fell or jumped into an excavation on the border of

[1] Ropho, etc., Townships *v.* Moore, 68 Pa. St., 404; 8 Am. Rep., 202; Mochler *v.* Town of Shaftsbury, 46 Vt., 580; 14 Am. Rep., 634.

[2] Goodnough *v.* Oshkosh, 24 Wis., 549; Requa *v.* City of Rochester, 45 N. Y., 129; 6 Am. Rep., 52. See Wisenberg *v.* City of Appleton, 26 Wis., 56; 7 Am. Rep., 39.

[3] Requa *v.* City of Rochester, 45 N. Y., 129; Green *v.* Danby, 12 Vt., 338; Chicago *v.* McCarthy, 75 Ill., 602; Peru *v.* French, 55 Ill., 317; Chicago *v.* Langlass, 66 Ill., 361; Galesburg *v.* Higley, 61 Ill., 287.

[4] Colby *v.* Inhabitants of Westbrook, 57 Me., 181; 2 Am. Rep., 30; Reed *v.* Northfield, 13 Pick., 94; Harnden *v.* New Haven, etc., Co., 27 Conn., 158; Bragg *v.* Bangor, 51 Me., 532; Holt *v.* Penobscot, 56 Me., 15.

the street, of which the city had notice that it rendered the street dangerous, the city was held liable for the resulting injuries.[1]

§ 480h. Notice to Abate Nuisance.— The right of an individual to abate a nuisance which is the result of the acts or omissions of another, in some instances depends upon notice. Thus, where one party builds a house on land where another has a right of common, before the latter could forcibly abate the nuisance it was held his duty to notify the party responsible therefor.[2] The object of this is, of course, to enable the wrong-doer to remove the nuisance. But the party responsible for a nuisance is not, in every case, entitled to notice. Where the act complained of is one of positive wrong or wilful negligence, or the security of life or property is endangered and the danger seems imminent, the party threatened with the injury may abate the same without giving notice to the wrong-doer or waiting for him to remove it.[3] Where, however, the nuisance is merely permitted to exist, and the case is not very urgent, notice, and an opportunity to remove it, is essential before the complaining party would be justified in forcibly abating the same.[4]

§ 480i. Dangerous Animals.— Whether the owner of animals may be held liable for injuries committed by them is not, at common law, a question of diligence in the care of such animals, so much as it is one of notice or knowledge of the propensity of the animal to inflict injury.[5] Thus, the keeping of a vicious dog, after notice of his disposition, was held to render the owner liable to any one injured,

[1] Basset *v.* City of St. Joseph, 53 Mo., 290; 14 Am. Rep., 446.

[2] Baldwin *v.* Smith, 82 Ill., 162; Perry *v.* Fitzhowe, 8 Q. B., 757; Burling *v.* Read, 11 Q. B., 904; Davis *v.* Williams, 16 Q. B., 546; Meeker *v.* Van Rensselaer, 15 Wend., 397; State *v.* Parrott, 71 N. C., 311.

[3] Earl of Lonsdale *v.* Nelson, 2 B. & C., 302.

[4] Jones *v.* Williams, 11 M. & W., 176; Meeker *v.* Van Rensselaer, 15 Wend., 397; Van Wormer *v.* Albany, 15 Wend., 262; Occum Co. *v.* Sprague Co., 34 Conn., 529; Hart *v.* Albany, 3 Paige, 213.

[5] May *v.* Burdett, 9 Q. B., 101; 1 Hale, P. C., 430, pt. 1, ch. 33.

without allegation or proof of special negligence on the part of such owner.[1] And where bees inflicted injuries upon horses, the owner of the latter was held unable to recover from the owner of the former without proof of notice of the mischievous propensity of the bees.[2] But the notice which is sufficient to render the owners of dangerous or mischievous animals responsible is exceedingly informal. It need not be express notice; may be inferred from the owner's acquaintance with the offending animal, and its notorious disposition to evil.

§ 480k. Notice of Dangerous Condition of Machinery — Misconduct of Employees, etc.— Where individuals or corporations are engaged in occupations which are from their nature fraught with unusual danger to the health or security of others, they must be presumed to take notice of the injuries likely to ensue from the employment of the means necessary to the business, so far as to impose upon them the duty of care proportioned to the hazard, and for want of such care will be held liable to those injured in consequence of the owner's negligence.[3] Upon the other hand, when one engages in a hazardous, though lawful, occupation, as an employee, he is presumed to take notice of the incidental risks of the business in which he engages, and cannot hold the master liable for injuries naturally resulting by accident therefrom.[4] But there are injuries resulting from carrying on a lawful business, in consequence of particular defects in the appliances used by the proprietor, as well as injuries from the negligence or wilful misconduct of employees,

[1] Wolf *v.* Chalker, 31 Conn., 121; Laverone *v.* Mangianti, 41 Cal., 138. See Besozzi *v.* Harris, 1 F. & F., 92; Van Lenven *v.* Lyke, 1 N. Y., 515; Rex *v.* Huggins, Ld. Raym., 1583; Canefox *v.* Crenshaw, 24 Mo., 199; *post*, § 695.

[2] Earl *v.* Van Alstine, 8 Barb., 630.

[3] Ill. Cent. R. Co. *v.* McClelland, 42 Ill., 355; Frankford, etc., Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St., 345; Anderson *v.* Cape Fear, etc., Co., 64 N. C., 399; Spalding *v.* Chicago, etc., R. Co., 30 Wis., 110; Hoyt *v.* Jeffers, 30 Mich., 181.

[4] Cooley on Torts, 541.

which may be inflicted upon those who are in no way concerned in the business. For these the proprietor may be held liable. But if such liability does not actually depend upon the proprietor's having notice of the defect, or the incompetence of the employee, proof of such knowledge or notice would at least have a tendency to aggravate the offense, and affect the measure of damages in an action brought by one upon whom the injury was inflicted.[1] And when the question of notice figures in this manner in an action for a wrong, either to fix the liability or enhance the damages, notice to an officer, agent or servant of the wrong-doer, when such officer, agent or servant is placed in charge of the subject concerning which the notice is given, will be as binding as though notice had been given to the defendant in person.[2]

[1] Malick *v.* Tower Grove, etc., R. Co., 57 Mo., 17; Baldwin *v.* Cassella, L. R., 7 Ex., 325; Hoyt *v.* Jeffers, 30 Mich., 181.

[2] *Post*, § 695.

VII. Notice By Which Certain Contract Liabilities May be Fixed.

§ 480*l*. Contracts of Indemnity — Notice of Suit.
480*m*. Measure of Damages Affected by Notice.
480*n*. Notice of Customs that Affect Contracts — General Usages and Customs.
480*o*. Knowledge or Notice Must be Previous to the Transaction.

§ 480l. Contracts of Indemnity — Notice of Suit.— The subject of this title embraces in a general way that which has been more particularly considered in another place.[1] When the contract of indemnity is of the most general character, against loss of any kind, whether it embraces stipulations for notice in case of loss or not, it goes without saying, that, before the party indemnified can recover, he must give notice of his loss to the indemnitor. As, for example, contracts of insurance and the like. Where notice is expressly stipulated for, as is usually the case, the want of it will defeat the action.[2] When the contract is to indemnify a purchaser or surety against the result of a suit, the covenantee has a right to defend, either in the action against which he undertakes to indemnify, or the action on his contract. Hence, to bind him by the judgment against the indemnified party, he must have due and timely notice of the action, to the end that he may make his defense;[3] otherwise, when the party to be indemnified brings his action against the indemnitor, the latter is at liberty to defend against the demand, and will not be concluded by the judgment.[4]

[1] *Ante*, §§ 444 *et seq.*, 480*c et seq.*

[2] Bridgeport Ins. Co. *v.* Wilson, 34 N. Y., 275.

[3] Rapelye *v.* Prince, 4 Hill, 119; Chamberlain *v.* Godfrey, 36 Vt., 380; Patton *v.* Caldwell, 1 Dall., 419; Thomas *v.* Hubbell, 15 N. Y., 405.

[4] Smith *v.* Compton, 3 B. & Ad., 407; Marltalet *v.* Clary, 20 Ark., 251; Boyd *v.* Whitfield, 19 Ark., 447; Train *v.* Gold, 5 Pick., 380; Reggio *v.* Braggiotti, 7 Cush., 166; Collingwood *v.* Irwin, 3 Watts, 306; Baynard *v.* Harrity, 1 Houst., 200.

§ 480m. Measure of Damages Affected by Notice.— In an action brought on a contract of indemnity against the result of a suit, the measure of damages is sometimes held to be fixed by notice. Thus, where a surety is sued on his undertaking, it is decided that he is under no obligation to pay it to save costs, at least not unless he is expressly notified that the principal has no defense to the demand. And if the debt or demand is liquidated, it is not his duty to make a defense in order to entitle him to recover against his indemnitor the costs paid in case of default.[1] But where the action is on an unliquidated demand, or the liability is disputable, the general rule seems to be that the defendant may give notice to the party whose duty it is to indemnify, and not defend the action unless so directed; or he may use his best judgment in the matter, if the facts seem to warrant a defense, holding the principal, or indemnitor, for the costs and expenses of the suit.[2] The most that notice of the suit from the indemnified party can do to affect the measure of damages, in his action on the contract of indemnity, is (1) by making the judgment binding on the indemnitor whatever be the amount, and (2) by throwing upon the indemnitor the responsibility of deciding to what extent costs shall be incurred in defending the original action.

§ 480n. Notice of Customs that Affect Contracts — General Usages and Customs.— When a custom or usage is general, in the broadest sense of the term, it will be binding upon all, upon the presumption that it is known to every one.[3] But the term "general," as applied to customs and usages, has a qualified signification. When it is so general as to apply to every person everywhere, it is held

[1] Baker *v.* Martin, 3 Barb., 634; Elwood *v.* Deifendorf, 5 Barb., 412; Holmes *v.* Weed, 24 Barb., 546; Wright *v.* Whiting, 40 Barb., 240; Hulett *v.* Soullard, 26 Vt., 295; Blenden *v.* Charles, 7 Bing., 246; Craig *v.* Craig, 5 Rawle, 91; Coulter *v.* Morgan's Adm'r, 12 B. Mon., 278.

[2] Duxbury *v.* Vermont, etc., R. Co., 26 Vt., 751; Pitkin *v.* Leavitt, 13 Vt., 379; Wynn *v.* Brooke, 5 Rawle, 106; Dubois *v.* Hermance, 56 N. Y., 673; Westfield *v.* Mayo, 122 Mass., 100; Ottumwa *v.* Parks, 43 Ia., 119.

[3] Tyson *v.* Smith, 1 Nev. & P., 784.

to amount to the common law.[1] A local or particular custom is general within the community where it prevails, and must be general to this extent in order to be valid and binding upon those who are not specially notified of its existence.[2]

When a custom of trade is general within a particular city, it will be presumed to be known to those dealing at that market, whether as buyer or seller. But proof of the existence of a custom in several cities will not suffice to establish a general custom upon the river where such cities are situated.[3]

When one is to be affected by a certain usage or custom, he must have knowledge or notice of its existence, and the only difference between general and particular usages in this respect is in the circumstances from which this knowledge will be presumed. Every custom is both general and particular, depending upon the relation which it bears to the persons to be affected. The custom of merchants in a particular city is general in its effects upon those dealing there, and particular as to the rest of the world. The usages of a bank are general in reference to its own customers, and particular as they affect strangers. In either case those without the purview of the notice in a general way can only be affected where they have particular notice. In any event, there must be knowledge, either actual or presumed.[4] And where it is a particular custom of a certain

[1] Fitch *v.* Rawling, 2 H. Black., 393.

[2] Citizens' Bank *v.* Grafflin, 31 Md., 507; Folsom *v.* Merchants', etc., Ins. Co., 38 Me., 414; Commonwealth *v.* Mayloy, 57 Pa. St., 291; Oelricks *v.* Ford, 23 How., 49; Richardson *v.* Goddard, 23 How., 44; Coffman *v.* Campbell, 87 Ill., 98; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick., 108; Gleason *v.* Walsh, 43 Me., 397; Perkins *v.* Jordon, 35 Me., 23; Thompson *v.* Hamilton, 12 Pick., 426; Clark *v.* Baker, 11 Metc. (Mass.), 188.

[3] Walsh *v.* Frank, 19 Ark., 270.

[4] Dodge *v.* Favor, 15 Gray, 82; Fisher *v.* Sargent, 10 Cush., 250; Marlin *v.* Maynard, 16 N. H., 165; Pierce *v.* Whitney, 29 Me., 188; Martin *v.* Hall, 26 Mo., 386; Walsh *v.* Miss. Trans. Co., 52 Mo., 434; Bradley *v.* Wheeler, 44 N. Y., 500; Dawson *v.* Kittle, 4 Hill, 107; Whitesell *v.*

branch of business, it is not presumed to be known even to dealers[1] who would be affected by the general usages of the same business without proof of notice.[2]

§ 480o. Knowledge or Notice Must be Previous to the Transaction.— Whether the knowledge of the custom with which it is sought to affect a party in a particular transaction is actual or presumed, it must be prior to the transaction in which the question of liability is raised. If the presumption of knowledge is based upon the fact that the party to be charged is a dealer or customer, this relation must have previously existed. Thus, where it was sought to charge a servant with notice of a custom to give notice prior to quitting the employ of the master, it was held that he must have had notice of such a custom at the time of entering upon the service. And hence the fact that the servant was in the employ of the master could not be relied on as raising a presumption of knowledge.[3] Where interest was charged on an account, under an alleged custom among merchants to charge interest, and it appeared that no such charge had been made against defendant on similar accounts, it was held that he was not bound by the custom.[4] The case was different where, in a subsequent case, it was found that not only was the custom uniform, but that inter-

Crane, 8 W. & S., 369; Patterson *v.* Franklin Ins. Co., 22 Pittsb. L. J., 201; Lewis *v.* The Success, 18 La. An., 1; Boyd *v.* Graham, 5 Mo. App., 403; Sugart *v.* Mays, 54 Ga., 554; Scott *v.* Whitney, 41 Wis., 504; Power *v.* Kane, 5 Wis., 265; Bliven *v.* New England Screw Co., 23 How., 420; National Bank *v.* Burkhardt, 100 U. S., 686; Dugard *v.* Edwards, 50 Barb., 289; Pitre *v.* Offut, 21 La. An., 679.

[1] Williams *v.* Niagara F. Ins. Co., 50 Iowa, 561; Carter *v.* Boelim, 3 Burr., 1905; Stebbins *v.* Globe Ins. Co., 2 Hall, 632; Taylor *v.* Ætna Life Ins. Co., 13 Gray, 434; Howard *v.* Great Western Ins. Co., 109 Mass., 384.

[2] Grant *v.* Lexington Fire Ins. Co., 5 Ind., 23; Toledo, etc., Ins. Co. *v.* Speares, 16 Ind., 52.

[3] Stevens *v.* Reeves, 9 Pick., 198; Collins *v.* New England Iron Co., 115 Mass., 23.

[4] Wood *v.* Hickok, 2 Wend., 501. See, also, Trotter *v.* Grant, 2 Wend., 413.

est had been charged in former accounts, and paid by the defendant.[1]

A single case of dealing with a particular establishment will not raise the presumption of knowledge of its usages and customs, so far as such knowledge applies to customers or those dealing with such establishment. Thus where, in response to a written circular from a firm of stock brokers, guaranteeing a fluctuation of eight per cent. on sixty-day "straddle" contracts to a certain amount, a new customer sent the brokers the required amount for such investment, and during the sixty days the stock purchased rose, but the brokers, according to a custom, had sold the same stock "short," prior to purchasing, and thereby lost, it was held that the customer, being ignorant of such usage, was not bound by it, but might claim under his contract.[2]

There is no legal presumption that a traveler who alights at an inn has knowledge of the particular usages of that particular inn.[3] Nevertheless, there are numerous and well supported decisions to the effect that those who send goods to a particular market, even for the first time, or engage in the peculiar dealings of any business house that has certain customary methods of carrying on its trade, will be bound by such customs, upon the presumption that they made themselves acquainted with them before contracting.[4] Thus, when a note is made for the purpose of being negotiated at a particular bank, a general custom of the bank, which is not contrary to law, in respect to the demand of payment and notice of dishonor, will bind the parties on the presumption that they were acquainted with it.[5] But to have this

[1] Merch *v.* Smith, 7 Wend., 315.

[2] Harris *v.* Tumbridge, 8 Abb. N. C., 291.

[3] Berkshire, etc., Co. *v.* Proctor, 7 Cush., 417.

[4] Lonergan *v.* Stewart, 55 Ill., 44; Bailey *v.* Bensley, 87 Ill., 556; Graves *v.* Legg, 11 Exch., 642; Sutton *v.* Tatham, 10 Ad. & Ell., 27.

[5] Renner *v.* Bank of Columbia, 9 Wheat., 582; Mills *v.* Bank of United States, 11 Wheat., 431; Dorchester *v.* New England Bank, 1 Cush., 177; Smith *v.* Whiting, 12 Mass., 6; Bank of Columbia *v.* Fitzhugh, 1 Har. & G., 239; Bank of Washington *v.* Triplett, 1 Pet., 25.

effect the custom must be notorious from constant and frequent use for a considerable time, unless it can be shown to have been known to the party to be charged. A practice adopted by a bank for but two years, within which time there were but four instances of its use, was held to be wanting in notoriety.[1]

Where one employs a broker, who is a member of the stock exchange, to buy or sell stocks, he must be presumed to authorize such broker to transact his business according to the general usages and customs of the institution with which he is connected.[2]

Where, however, the business transacted is with no reference to a particular bank, the party cannot be presumed to have any knowledge of its customs, and can only be affected thereby on proof of notice. As, where a check was drawn on a certain bank, and passed by the indorser through another, the drawer could not be bound by the existence of a custom between the two banks of which he had no previous knowledge.[3]

[1] Adams *v.* Otterback, 15 How., 539.

[2] Sutton *v.* Tatham, 10 Ad. & El., 27; Bayliffe *v.* Butterworth, 1 Exch., 425; Walls *v.* Bailey, 49 N. Y., 464.

[3] Mohawk Bank *v.* Broderick, 13 Wend., 133. See, also, Lime Rock Bank *v.* Hewett, 52 Me., 51; Overman *v.* Hoboken City Bank, 30 N. J. L., 61.

CHAPTER VIII.

NOTICE BY WHICH LIABILITY IS EXTINGUISHED OR MODIFIED.

I. Dissolution of Partnership.
II. Notice Limiting the Liability of Common Carriers and Other Bailees.
III. Landlord and Tenant.

I. Dissolution of Partnership.

§ 481. General Nature of Partnership.
482. Range of Inquiry.
483. Reason for Requiring Notice of Dissolution.
484. Personal Notice, Oral or Written.
485. Knowledge Derived from Circumstances.
486. Use of Name After Retirement.
487. Effect of Legal Notice of Dissolution.
488. Corporation Using Partnership Name.
489. Notice Unnecessary to Those Ignorant of the Partnership.
490. Illustration of Above.
491. General Knowledge of Partnership Sufficient.
492. Dormant Partner.
493. Dormant with Respect to Particular Transaction.
494. Must be Unknown.
495. Known to Some, Unknown to Others.
496. Dissolution by Death.
497. Dissolution by Bankruptcy.
498. Effect Upon Surviving or Solvent Partners.
499. Manner of Giving Notice.
500. Communication by Mail.
501. Not Conclusive Unless Received.
502. To Agent or Servant.
503. Altering Signs, etc.
504. Public Advertisement.
505. Publication Insufficient.
506. Reading Paper Not Conclusive.
507. Inference Drawn from Publication.

§ 508. What Are Prior Dealings.
509. Discounting Notes.
510. Honoring Successive Drafts.
511. Renewal of Accommodation Paper.
512. Single Purchase.
513. Notice to New Customers.
514. Time of Publication.
515. Publication in Newspaper.
516. Where Published.
517. Selection of Newspaper.
518. Manner Open to Inquiry.
519. English and American Doctrine.
520. Liability of Retiring Partner Affected by Subsequent Conduct.
521. Estoppel.
522. Example of New Customer Entitled to Actual Notice.
523. Knowledge of Expiration of Partnership.
524. Notice of Limited Partnership.
525. Special Partnership.
526. Restrictions and Limitations.
527. Assumption of Excess of Authority by One Partner.
528. Misapplication of Funds.
529. Effect of Dissolution Upon Guarantor.
530. *Onus Probandi.*

§ 481. General Nature of Partnership.— The obligations arising out of the relation of partnership are of a very peculiar character. This relation involves a greater degree of mutual confidence than any other known to the law which is formed merely for business purposes. Each member of a partnership may be said to hold all that he has absolutely at the mercy of each of his copartners, limited only by the extent of the credit which the partnership can command. For each one may, by his contracts, bind not only the entire firm property, but, in the name of the partnership, may incur liabilities for which each of the others, as well as himself, will be individually liable.[1] These liabilities, once incurred, will continue until discharged, notwithstanding the subsequent dissolution of partnership.[2] But

[1] Story on Part., §§ 126–65.
[2] *Ibid.*, § 334; Aiken *v.* Thompson, 43 Ia., 606.

though the liabilities assumed in the name of the partnership cannot be shaken off by any one of such partners merely by dissolving his business relations with the others, he may, by proper notice, modify his liability for future transactions, or escape absolutely all responsibility for the contracts to be entered into in the name of the partnership after the severance of his connection therewith.[1]

§ **482. Range of Inquiry.**— Our inquiries will not be confined strictly to notice of dissolution, but will extend to notice of every kind that has for its purpose the limitation, qualification or termination of the liability of copartners for further transactions of the firm of which they are members, whether such liability be general or special.

§ **483. Reason for Requiring Notice of Dissolution.**— The reasons are obvious for requiring notice of the dissolution of the partnership, in order to terminate the liability of the retiring member on account of partnership debts contracted subsequent to his retirement. Having held himself out to the world as a partner in the past, he has thereby authorized others to think him what he represents himself to be. He has, by his own act, given the partnership the credit of his name, and so long as such partnership exists, those who know it will be presumed to know it as originally constituted, until informed of a change in its membership. To hold otherwise would cast upon those who have dealings with a partnership the unusual and onerous duty of taking cognizance of the interior working of the affairs of a concern, which the members fail to disclose. It would shift the obligation of diligence from the party who is not only primarily interested, but who is so peculiarly situated as to incur no hazard except from his own negligence, to him who is only secondarily interested, and who might exercise extraordinary diligence without coming to a knowledge of the fact. Even when there was no fraud in the concealment, it would reverse the rule that, as between two

[1] Pars. on Part., 411.

innocent persons, he should suffer whose act or omission was the cause of the injury.[1]

§ 484. Personal Notice, Oral or Written.— Where the notice to a subsequent creditor is actual, in the narrow sense that it is personally communicated to him, it may be either oral or written, and would probably be sufficient if coming from any one with apparent knowledge of the fact.

§ 485. Knowledge Derived from Circumstances.— The object of notice being to convey knowledge of the dissolution, any circumstance by which such knowledge may be brought home to the subsequent creditor of the firm will, in general, obviate the necessity of formal notice.[2] And the question of knowledge is one of fact and not of law.[3]

§ 486. Use of Name After Retirement.— The only event in which a subsequent creditor, with knowledge of a prior dissolution, may hold the retiring partner, is where, notwithstanding the retirement of the partner, so far as his interest is concerned, he permits his name to be used as a member, for the purpose of giving the partnership the credit of his name, thus continuing his liability. Where, in case of such a dissolution, the retiring partner merely *permits* the use of his name in connection with future business of the partnership, by silent acquiescence, without any express agreement to that effect, it has been held that those dealing with the firm, with knowledge of the formal dissolution of the partnership relation, knowing of the continued use of the name of such retiring partner, have a right to rely upon that as an indication that he consents to remain liable for the future contracts of the partnership.[4]

[1] Tombeckbee Bank *v.* Dumell, 5 Mason, 56; Lansing *v.* Gaine, 2 Johns., 300; Le Roy *v.* Johnson, 2 Pet., 198; Brown *v.* Leonard, 2 Chit., 120; Parkin *v.* Carruthers, 3 Esp., 246; Newsome *v.* Coles, 2 Camp., 617; Dolman *v.* Orchard, 2 Car. & P., 104; Zollar *v.* Janvrin, 47 N. H., 324.

[2] Irby *v.* Vining, 2 McCord, 379; Hart *v.* Alexander, 2 M. & W., 484; Prentiss *v.* Sinclair, 5 Vt., 149.

[3] Deford *v.* Reynolds, 36 Pa. St., 325.

[4] Emmet *v.* Butler, 7 Taunt., 599; Mulford *v.* Griffin, 1 Fost. & F., 145; Evans *v.* Drummond, 4 Esp., 89; Newmarch *v.* Clay, 14 East, 239;

§ 487. **Effect of Legal Notice of Dissolution.**— It has, however, been decided elsewhere that one having knowledge of the prior connection of the retired partner with the firm, but who has no actual notice or knowledge of the dissolution, of which, however, such notice as is prescribed by law has been given, is not warranted in giving credit to the new firm upon the faith of the continued use of the name of the late member of the partnership, merely because the latter has taken no positive measures to prevent its continued employment in that connection.[1] This decision is grounded upon the reason that as the retiring member of the partnership, upon its dissolution, has resorted to all the precautions pointed out by the law as requisite to convey the necessary information to creditors of that class, he could not be accused of negligence, nor would a fraudulent intent be imputed to him by the court, merely because he did not seek by a bill in equity to enjoin the further use of his name in connection with the business from which he had publicly severed his connection.

§ 488. **Corporation Using Partnership Name.**— But where a partnership was dissolved by the organization of its constituent members into a private corporation, and conveying the partnership property to the corporate body, and the members of the partnership allowed the busines to be still conducted in the old name, they were justly held liable as partners to one who had no notice of the dissolution.[2]

§ 489. **Notice Unnecessary to Those Ignorant of the Partnership.**— It cannot be said that upon the dissolution of a business partnership, the retiring members will in every instance be held liable for the future contracts or acts of the firm, where notice of the dissolution is neglected. Whether such liability will be incurred by them depends in a great measure upon the relations between the new cred-

Ketcham *v.* Clark, 6 Johns., 144; Amidown *v.* Osgood, 24 Vt., 278; Brown *v.* Leonard, 2 Chit., 120; Howe *v.* Thayer, 17 Pick., 91.

[1] Newsome *v.* Coles, 2 Camp., 617.

[2] Goddard *v.* Pratt, 16 Pick., 412.

itor and the old partnership. It would be going an unreasonable length to hold that, merely because notice of the late partner's retirement is not given, he shall be held liable to those who have subsequent dealings with the firm, in ignorance not only of the dissolution, but also of the fact that the partnership which has been dissolved ever had an existence. It has therefore been held that in order to render a retired partner liable to those having subsequent dealings with his successors in business, three facts must concur: 1. That the party seeking to hold him must have known, at the time he dealt with the firm, of the former partnership. 2. That he was ignorant of the dissolution; and 3. That his dealings with the partnership were had supposing that he was contracting with the retired partner as well as his successors, and in reliance upon their joint liability.[1] It was also held that general notoriety with respect to the existence of the partnership which had been dissolved without notice would not be sufficient to supply the place of knowledge. The transaction, to entitle the creditor to enforce his remedy against the retired partner, jointly with those continuing the business, must be, on the part of the creditor, based upon his faith in the solvency and standing of the party he seeks to hold. He could not be presumed to have acted upon such faith unless there was some antecedent knowledge of the fact upon which he is supposed to rely.[2]

§ 490. **Illustration of Above.**— When, therefore, a firm which remains after the dissolution, as the successor of the partnership dissolved, whether carrying on business under the same or a different name, has dealings with a stranger, who has had no dealings with the former partnership, and who has no knowledge of such partnership, notice of any kind is unnecessary in order to enable the retiring members of the old concern to escape liability for such subsequent contracts; but it would be otherwise held where the party

[1] Pratt *v.* Page, 32 Vt., 13.
[2] *Ibid.*

had knowledge of the partnership, but not of its dissolution.[1]

§ 491. **General Knowledge of Partnership Sufficient.**— Bank of Brooklyn *v.* McChesney[2] was where the liability incurred in the name of the partnership, after former dissolution, was by a promissory note made in the name of the firm by one of the partners for the accommodation of a third person. The note was taken in good faith by one who had had no prior dealings with the partnership, but who knew that there was such a firm, and had never received any information of its dissolution. There being neither actual nor constructive notice that the partnership had been dissolved when the note was taken, it was held that the retiring partners were not released from their liability by such dissolution.

§ 492. **Dormant Partner.**— A dormant partner may dissolve his connection with the partnership, and in so doing escape all liability on account of the future transactions of the firm, whether with new or old customers, by giving notice of such dissolution.[3] The reasons for excepting a partner of this kind from the general rule are, that, as his connection with the firm is unknown, his liability could not be said to depend upon the fact that the credit was given to him. His liability arises from the fact that he shares the profits. It is created by operation of law, irrespective of the intention of the parties. When his interest in the profits ceases, the reason for his liability is removed, and though he may continue to be liable for the obligations incurred by the partnership during his connection with it, he will not be affected by those growing out of future transactions.[4]

[1] Story on Part., § 160; Chamberlain *v.* Dow, 10 Mich., 319; Warren *v.* Ball, 37 Ill., 76; Evans *v.* Drummond, 4 Esp., 89; Newmarch *v.* Clay, 14 East, 239.

[2] 20 N. Y., 240.

[3] Pars. on Part., 497.

[4] Story on Part., § 159, and authorities there cited. See, also, Warren *v.* Ball, 37 Ill., 76; Newmarch *v.* Clay, 14 East, 239; Kennedy *v.* Bohannon, 11 B. Mon., 118; Scott *v.* Colmesnil, 7 J. J. Marsh., 416.

§ 493. **Dormant with Respect to Particular Transaction.**— It was accordingly held that the attorney whose partner was employed in the management of a suit, being a dormant partner with respect to that particular business, would not be liable for funds coming to the hands of his partner as the fruits of such litigation, after the partnership between them had been dissolved, although notice of such dissolution was never given.[1]

§ 494. **Must be Unknown.**— But in order to constitute one a dormant partner, so that he may escape liability for the future transactions of the firm by dissolution without notice, it is not sufficient that his name does not appear in that of the firm. To be a dormant partner, he must not only be silent in the sense that his connection with the partnership is not advertised, but such connection must be unknown. It is, therefore, not such concealment of his interest as will entitle him to the immunities of a dormant partnership, when, instead of his name as a member of the firm, the usual substitute "Co." is employed.[2] It was also held that where the firm was styled R. M. & Co., the mere fact that the one dealing with the partnership was ignorant of the name of R. M.'s partner would not render such partner dormant within the meaning of the law, and with reference to subsequent dealings with such party.[3]

§ 495. **Known to Some, Unknown to Others.**— One may be a dormant partner with respect to certain persons with whom the firm has dealings, and stand upon an entirely different footing towards others. His connection with the partnership may be concealed from a portion of the public, while others are fully cognizant of his interest and consequent responsibility. And the fact that the interest of a former dormant partner was known to one person with whom the firm has dealings subsequent to the dissolution

[1] Ayrault *v.* Chamberlin, 26 Barb., 83.

[2] Deford *v.* Reynolds, 36 Pa. St., 325; Edwards *v.* McFall, 5 La. An., 167; Magill *v.* Merrie, 5 B. Mon., 168; Deering *v.* Flanders, 49 N. H., 225.

[3] Deford *v.* Reynolds, *supra.*

cannot be rendered available to create a liability against such retired partner, and in favor of one who was ignorant of such partnership until he had heard of its dissolution.[1]

§ 496. **Dissolution by Death.**— It is probably well settled that, when the partnership is dissolved by the death of one of the partners, notice of such dissolution is not necessary in order to exempt his estate from liability for the future obligations of the partnership.[2] The only known exception to this rule is where a surviving partner represents the estate of the deceased partner as executor. It has been held that, in such an event, as the surviving partner, in his representative capacity, has power to bind the estate when notice of the death is omitted, such notice should be given to those having dealings with the firm.[3]

§ 497. **Dissolution by Bankruptcy.**— So, also, when the partnership is dissolved by reason of the bankruptcy of one of its members, or, as it has been styled, his "*quasi* death,"[4] notice is unnecessary to prevent his estate from becoming liable for the future obligations of the firm, for the combined reasons that the adjudication is a notorious fact, and that by this means the law deprives the bankrupt of all means of satisfying such liabilities.[5]

§ 498. **Effect Upon Surviving or Solvent Partners.**— As to whether the surviving or solvent partners would be absolved from liability for obligations incurred in the name of the partnership, subsequent to dissolution by the death or bankruptcy of one of the members of the firm, without notice, express or implied, other than the decease or adjudication, much would probably depend upon their own conduct with respect to the subsequent management of the business

[1] Cregler *v.* Durham, 9 Ind., 375.

[2] Washburn *v.* Goodman, 17 Pick., 519; Webster *v.* Webster, 3 Swanst., 491; Murray *v.* Mumford, 6 Cow., 441; Burwell *v.* Mandeville, 2 How. (U. S.), 560; Canfield *v.* Hard, 6 Conn., 180; Parsons on Part., 449; Story on Part., §§ 319, 336, 339.

[3] Vulliamy *v.* Noble, 3 Meriv., 592.

[4] Pars. on Part., 474.

[5] Franklin *v.* Brownlow, 14 Ves., 550; Thomason *v.* Frere, 10 East, 418.

in which the partnership was engaged. If they continued to carry on the business as before, each of the surviving or solvent members of the firm would be bound by subsequent contracts made in the name of the partnership as it existed prior to the death or bankruptcy, in the absence of notice to the contrary. This, however, would be as well for the reason that the remaining members might be regarded as having entered into a new partnership, under the old name, as because of a failure to give notice of the dissolution. Such a continuation by them might be looked upon as notice to the world of the formation of a new firm, and their adoption of the name of the old for the sake of preserving to themselves the good will, and those who had actual notice of the dissolution might extend credit to them under their former name, relying solely upon those who chose to continue the business. It has been held, however, that no good reason exists for requiring notice of dissolution by death, from the surviving partners, in order to exempt either of them from liability on account of future unauthorized contracts in the name of the old firm.[1] This was an action on a promissory note given by a surviving partner in the name of the firm, and the doctrine was clearly laid down by Bigelow, C. J., in rendering the opinion, that although the holder had taken the same without knowledge of the dissolution by death, the surviving partner who had no knowledge of the giving of such note could not be held responsible thereon; and for good and sufficient reasons, ably set forth in the opinion, and supported by authority, gives this as a rule applicable to all contracts made under similar circumstances.[2]

§ 499. Manner of Giving Notice.— Where notice of dissolution is requisite in order to exempt the retiring partner from liability on future obligations of the firm, the manner of giving such notice is governed to a considerable extent by the relations previously existing between the partnership and the party asserting the claim; but actual notice will be

[1] Marlett *v.* Jackman, 3 Allen, 287.
[2] Id., p. 296.

sufficient in all cases, whether the same be written or oral, or is given expressly by the retiring partner, or is derived from a knowledge of circumstances pointing directly to the conclusion that such partnership has been dissolved.[1]

§ 500. **Communication by Mail.**— The method in nearly all cases found to be most practicable and efficacious for the purpose of discharging the retiring partner from future obligations is by addressing to the party to be notified a written communication informing him of the fact of dissolution. Proof of notice sent to and received by him, through the mails, or served upon him personally, will be conclusive upon him for all time.[2]

§ 501. **Not Conclusive Unless Received.**— But it has been held that mere proof of the sending of a written notice by mail will not be sufficient to charge the party to whom it is addressed with knowledge of the altered relations of the partners. This manner of service is there held to be restricted in its conclusive effect to cases of notice of the dishonor of commercial paper. It is admitted, however, that the mailing of a written notice of dissolution to one having former dealings with the partnership would be a step in the direction of actual notice, and slight corroborative evidence would warrant the inference that such notice was received and the party duly advised of the change of firm; but this inference is regarded strictly as one of fact, and not of law.[3]

§ 502. **To Agent or Servant.**— Howsoever indulgent the courts may be in the matter of giving notice of dissolution, with reference to the means employed, it is nevertheless required, where actual notice is relied on, that it shall be communicated to the party to be affected thereby. It will not be sufficient if communicated to a mere servant or employee, unless, from the nature of his employment, his agency ex-

[1] Robb *v.* Mudge, 14 Gray, 534; Lange *v.* Kennedy, 20 Wis., 279; Davis *v.* Keyes, 38 N. Y., 94; Young *v.* Tibbitts, 32 Wis., 79. But see Ransom *v.* Loyless, 49 Ga., 471; Pars. on Part., 411.

[2] Kenney *v.* Altvater, 77 Pa. St., 34.

[3] *Ibid.*

tends to the particular transaction to be affected by the notice. Accordingly, where the retired partner went to the place of business of one with whom the firm had had prior dealings, and, on being accosted by a salesman, informed such salesman that he had not come to purchase, but to inform the house that the partnership theretofore existing had been dissolved, it was held that this was not sufficient to charge the employers of such salesman with actual notice of the retirement of such partner, so as to exonerate him from liability on a note subsequently given by his successor in the name of the firm. A failure to show that the fact was communicated by the salesman to his employer left it incumbent upon the party seeking to avail himself of such notice to prove that the authority of the agent extended to the acceptance of notice of dissolution.[1]

§ **503. Altering Signs, etc.**— Another method which is equally binding upon those cognizant of its adoption, and which is even more general than that of personal notice, is by altering the name of the firm on the signs and in all the correspondence carried on with their customers, together with a public advertisement of the dissolution in one or more public newspapers.[2] One having dealings with the new firm by means of epistolary correspondence, where the letters exchanged would show upon their face that one of the former members had retired from the concern, would seem to be estopped from claiming that in so dealing he relied upon the responsibility of such retired partner.[3]

§ **504. Public Advertisement.**— The authorities are not in entire accord as to the effect of a public advertisement of dissolution, as notice to those who have had prior dealings with the partnership. It seems to be generally agreed that the publication of such notice will not affect them unless it appears that they were in the habit of receiving and reading

[1] Stewart *v.* Sonneborn, 49 Ala., 178.
[2] Jenkins *v.* Blizard, 1 Stark., 418.
[3] Pars. on Part., 411.

the papers in which the notices appear.[1] The weight of authority, however, goes farther in restricting the operation of such published notice, holding that it will not be available against one who had had prior dealings with the partnership, unless it is shown that he has actually read the notice as published.[2]

§ 505. **Publication Insufficient.**— It was accordingly held in Lyon *v.* Johnson,[3] that the fact of notice of dissolution being published in a paper circulated where the business of the firm, and also that of the party with whom the dealings were had, was carried on, and such paper was taken by the party giving such credit, together with the further fact that the notice was printed directly adjoining the advertisement of the dealer, would not raise a presumption sufficiently strong to overcome the fact that such dealer had no actual notice. In other words, it was not sufficient of itself to constitute notice to such dealer. It was here admitted, however, that these facts, in conjunction with the lapse of time and other circumstances, might be regarded as evidence tending to prove the ultimate fact. But, upon the other hand, the circumstance that the credit was given to the old firm would have a tendency to show his want of knowledge of the altered relations of the members of the partnership.[4]

§ 506. **Reading Papers Not Conclusive.**— There seems to be no doubt that the mere fact that the prior dealer subscribes for and reads the paper containing the notice will not raise the legal inference of actual notice.[5] And although it would not be proper to reject evidence of such publication

[1] Galway *v.* Mathew, 1 Camp., 403; S. C., 10 East, 264.

[2] Hutchins *v.* Hudson, 8 Humph., 426; Hutchins *v.* Bank of Tenn., id., 418; Little *v.* Clarke, 36 Pa. St., 114; Boyd *v.* McCann, 10 Md., 118; Simonds *v.* Strong, 24 Vt., 642; Shurlds *v.* Tilson, 2 McLean, 458.

[3] 28 Conn., 1.

[4] See, also, as to effect of reading the paper containing the notice, Vernon *v.* Manhattan Co., 22 Wend., 183.

[5] Reilley *v.* Smith, 16 La. An., 31; Watkinson *v.* Bank of Pennsylvania, 4 Whart., 482; Shurlds *v.* Tilson, 2 McLean, 458.

and the taking and reading of the paper by the dealer, still the jury should be instructed that the mere taking of the paper was not of itself actual notice.[1]

§ 507. **Inference Drawn from Publication.**— Although the publication of notice cannot, as an inference of law, be taken as actual notice of dissolution to those who have had prior dealings with the partnership, it has been held that such a publication might lay the foundation for an inference of fact that such notice had been actually given. The case was one where an action was brought on a note given in the name of D. & T., a partnership originally composed of two members, but which had ceased to exist, as its members had discontinued the business under that name, prior to the execution of the note by D. The style and constituency of the firm were changed by taking in a new member, after which the house was known as "D., T. & C." It appeared in evidence that there was published at the request of the new firm, in a newspaper printed and circulated in the place where the business was conducted, the following notice: "Change of Firm — It will be seen by our advertising column that D. & T. have taken Mr. D. C. C. into partnership in the marine elevator and coal business. We congratulate the well-known firm on the accession of so energetic a business man as Mr. C. Together they will make a strong team." It was also testified by the holder of the note himself that he was in the habit of taking and reading the paper in which this notice appeared, prior to the date of the note. The court held, in substance, that the jury might have found from this that when the party took the note he had read the notice; and although it was not a positive statement from the parties interested of the change of firm, yet it was sufficient to put an ordinarily prudent and cautious man upon inquiry, leading to a knowledge of such change, and would therefore justify the jury in inferring that the note was taken with actual notice or

[1] Watkinson *v.* Bank of Pennsylvania, 4 Whart., 482.

knowledge that there was then no such firm in existence as that in the name of which the instrument was executed.[1]

§ 508. **What Are Prior Dealings.**— This being the rule as to those who have had prior dealings with the partnership, it becomes a question of some importance as to what amounts to such prior dealings as would entitle them to actual notice. Where the dealings have been directly between the party claiming the advantages of this position, and the partnership, as by selling goods to the firm, or making advances of cash, discounting paper for them, or any similar transaction in which the parties meet or confer together in the capacities of bargainor and bargainee, there can be no difficulty in reaching the conclusion that they are such prior dealings as would entitle the party to receive actual notice of such dissolution. But where the only prior dealing consisted in discounting a note bearing the name of the firm, such discount being made for another party, this was held not to amount to such "prior dealings" as would entitle the party discounting the paper to be actually notified of the dissolution, or for the want of such notice to pursue his remedy against the retiring partner.[2]

§ 509. **Discounting Notes.**— But where one of the members of a firm took a note to a bank for discount, and it was discounted on the faith of the firm's indorsement, this was held such prior dealings with the partnership as would entitle the bank to actual notice of the subsequent dissolution, in order to exonerate the retiring partner from liability for transactions by his successor in the name of the firm.[3]

§ 510. **Honoring Successive Drafts.**— And where the bank held a succession of drafts, accepted by the firm before dissolution, which drafts had been paid to the bank by the firm, this was held such prior dealings with the firm as

[1] Young *v.* Tibbitts, 32 Wis., 79.

[2] Bank of Brooklyn *v.* McChesney, 20 N. Y., 240.

[3] Bank of Commonwealth *v.* Mudgett, 45 Barb., 663; S. C., 44 N. Y., 514, where judgment was affirmed on appeal.

would entitle the bank to actual notice, as distinguished from a publication in a newspaper.[1]

§ 511. **Renewal of Accommodation Paper.**— So, where a note was given to the bank by a member of the firm, for the accommodation of a third party, and several times renewed in the name of the firm, though the retiring partner had nothing to do with the giving or renewal of the note, this was held such a prior transaction as would require the retiring partner to give actual notice of a dissolution of the partnership, in order to discharge himself from liability for a renewal subsequent to his retirement.[2]

§ 512. **Single Purchase.**— In order to constitute one such a creditor as has had prior dealings with the firm, that he may be protected in giving credit upon the faith of the partnership, without inquiry, in the absence of actual notice of dissolution, it is not necessary in every case that his prior dealings should have been numerous or continued over a long space of time. This principle may be illustrated by the case of Lyon *v.* Johnson.[3] There the defendants had been doing business in partnership, and, while so engaged in business, made a single purchase of coal of the plaintiffs. The partnership between the defendants was dissolved in the spring, and such dissolution was duly published in a newspaper in the place where the business of both plaintiffs and defendants was conducted. At the time of the subsequent purchase, however, the plaintiffs had no knowledge of such dissolution. It further appeared that, prior to the former transaction, defendants had been regular customers, in their firm name, in purchasing coal of the firm of which plaintiffs were the successors, carrying on the same business in the same place, and that one of the plaintiffs was a member of such firm, and the other had been employed by them as a clerk. These facts were held sufficient to entitle plaintiffs to recover of the partnership as constituted prior to the dis-

[1] Mechanics' Bank *v.* Livingston, 33 Barb., 458.
[2] Vernon *v.* Manhattan Co., 17 Wend., 524; S. C., 22 Wend., 183.
[3] 28 Conn., 1.

solution, notwithstanding the publication of such notice of dissolution. Whether, in all cases of a single transaction, the creditor would occupy the same position, the case cited does not determine. This would depend, no doubt, to a great extent, upon the magnitude of the purchase, or the importance of the dealing, as well as upon other attendant circumstances, such as the lapse of time between the two transactions, or between the prior dealing and the dissolution, or between the dissolution and the subsequent dealing for which the creditor seeks to hold the partnership. These at least would be facts proper for submission to the jury, to enable them to determine whether the prior dealings between the parties were such as to warrant the creditor in believing in the continued existence of the partnership as constituted at the time of the prior dealings.[1] But where the prior dealing is trifling in amount and attended with such circumstances as would indicate that it was made without any reference to the parties with whom it was had, as a casual sale for cash, credit being neither asked nor given, it is plain that the reason of the rule requiring actual knowledge or notice of the dissolution to those having former dealings with the firm would not apply.[2]

§ 513. Notice to New Customers.— We have already stated that, where the person with whom the transaction is had subsequent to the retirement or dissolution, knew of the former partnership, he would be entitled to notice, provided his subsequent dealing with the firm was in reliance upon the responsibility of the retiring partner, and, if not notified, would have a right to pursue his remedy against the retiring partner, although he had never had any dealings with the firm prior to its dissolution or the retirement of such partner.[3] But it is not essential that this notice should be actually communicated to him. The law is very jealous of the rights of those having dealings with partnerships, and holds

[1] Lyon *v.* Johnson, 28 Conn., 1.

[2] Pars. on Part., 415; Clapp *v.* Rogers, 12 N. Y., 283.

[3] *Supra*, § 483.

the individual members of any firm to a strict accountability for its obligations; but it would be going to unwarranted length to require one who wished to dissolve his connection with his business associates to actually notify every one who knew of the existence of the partnership, and might by any possibility have dealings with the firm in the future, at the peril of being held liable for such future transactions. It is therefore universally held that those who have not had prior dealings with the partnership may be sufficiently notified to prevent the accruance of any liability in his favor against the retiring partner by publishing the notice of the dissolution in a public newspaper.[1]

§ 514. **Time of Publication.**— There seems to be no fixed rule as to the time for which such publication shall be made, nor of the form of expression to be used, in order to exonerate the retiring member of the partnership from obligations subsequently incurred in the name of the firm.

§ 515. **Publication in Newspaper.**— Where the party having subsequent dealings with those pretending to represent the partnership which has been dissolved has known of the partnership during its existence, the rule generally laid down by the courts in this country and in England is that the retired partner may be held liable for obligations incurred in the name of the firm after his retirement, unless public notice has been given of the dissolution by publishing the fact in a newspaper.[2] And it has been even held under this rule that the mere notoriety of the fact of dissolution would not supply the place of such publication, in the absence of actual notice.[3]

§ 516. **Where Published.**— Where this rule is adhered to strictly, the notice is in general required to appear in a

[1] Mowatt *v.* Howland, 3 Day, 353; Lansing *v.* Gaine, 2 Johns., 300; Graves *v.* Merry, 6 Cow., 701; Ketcham *v.* Clark, 6 Johns., 144; Newsome *v.* Coles, 2 Camp., 617; Godfrey *v.* Turnbull, 1 Esp., 371.

[2] Southern *v.* Grim, 67 Ill., 106; Dickinson *v.* Dickinson, 25 Gratt., 321; Amidown *v.* Osgood, 24 Vt., 278; Prentiss *v.* Sinclair, 5 Vt., 149; Southwick *v.* McGovern, 28 Ia., 553.

[3] Pitcher *v.* Barrows, 17 Pick., 361; Holdane *v.* Butterworth, 5 Bosw., 1.

paper published in the place where the business of the partnership is carried on; but so far from this being an inflexible rule, the publication being made at the place of business will not always be conclusive upon subsequent creditors who reside elsewhere. As, where the factory of the firm was located at Baton Rouge, which was technically the place of business; but the partners resided in the city of New Orleans, where they were in the habit of raising funds for the prosecution of their business, it was held that the publication of a notice of dissolution in the newspapers of Baton Rouge was not sufficient to affect creditors residing in New Orleans, who, with antecedent knowledge of the partnership, but no knowledge of its being dissolved, subsequently gave credit to the firm.[1]

§ **517. Selection of Newspaper.**— By a custom of London the notice is published in the "London Gazette."[2] But nowhere in this country is it imperatively required that such notice shall be published in any particular paper. As the newspapers are numerous, the retiring partner has quite an extensive option in selecting the medium of communication. By publishing the notice in an obscure journal of very limited circulation, the fact may be effectually concealed from those most interested in knowing the *status* of the partnership. For this reason notification merely by such publication does not always serve to exonerate the retiring partner from liability to those who have never had prior dealings with the firm. The proof of sufficient notice is not always complete with the proof of publication, as in cases where original process is served by this method.

§ **518. Manner Open to Inquiry.**— The manner in which the publication is made is always open to inquiry respecting the paper selected as a medium; the number of times the advertisement is published; and even the extent of its display and the place it occupies in the paper. The question being one of diligence and good faith on the part of

[1] Grinnan *v.* Baton Rouge Mills Co., 7 La. An., 638.

[2] Parkin *v.* Carruthers, 3 Esp., 248.

the retiring partner, he will not be allowed to avail himself of such published notice unless it appears to have been as reasonable and sufficient as mercantile usage requires or the public have a right to expect.[1]

§ 519. **English and American Doctrine.**— The rule requiring the publication of notice as an absolute condition to the exemption of the retiring partner from future obligations of the firm, entered into with those who have had no prior dealings with the partnership, prevails in England with considerable uniformity, but in this country it has been emphatically denied by the highest legal authority known to our jurisprudence.[2] In this case, which was recently decided by the supreme court of the United States, the question was elaborately discussed, and the British and American authorities carefully and ably reviewed. The record disclosed that the business of the partnership, which was that of lumber dealers, had been conducted at the city of Davenport in the state of Iowa. Upon the dissolution actual notice was given to those having former dealings with the firm, and there was such an open and notorious change of business as would have apprised all those engaged in the same line of business in that community, that one of the partners had withdrawn. The action was brought on certain drafts, drawn and accepted by the remaining partner after dissolution. The holders of the drafts had never had any dealings with the firm, but had heard that there was such a firm doing business as lumber dealers at Davenport. At the trial there was no evidence of publication of notice in the newspapers of Davenport or at the place where the drafts were drawn, which was about five hundred miles distant, on the Mississippi river. Evidence was offered and rejected by the trial court for the purpose of proving: 1. That at the time of dissolution it was generally known among business men at Davenport that the partnership was dissolved. 2. That it was generally known along the Missis-

[1] Wardwell *v.* Haight, 2 Barb., 549; Pars. on Part., 418.

[2] Lovejoy *v.* Spafford, 4 Cent. L. J., 80; 93 U. S., 430.

sippi river that this dissolution had taken place. 3. That at the time of dissolution the facts were communicated to others than the plaintiffs, and to whom, and in what manner, they were so communicated. 4. That at the time the partnership was dissolved it was a matter of general repute and knowledge in their place of business. 5. That prior to the date of the drafts, notice was given to all or nearly all the lumber dealers where the holders of such drafts resided at the time, and near which the drafts were drawn and accepted. This evidence was avowedly offered, not for the purpose of bringing home actual knowledge to the plaintiff, but merely to show circumstances which, from their notoriety, would amount to such implied notice as would suffice to bind strangers. The substantial ground upon which the evidence was rejected was that nothing short of publication in the newspapers of the place of business of the partnership would be sufficient. In reversing the judgment for error in rejecting the evidence offered on behalf of the defendant, the court held that it was not an absolute inflexible rule that there must be a publication in a newspaper to protect a retiring partner. In delivering the opinion of the court Mr. Justice Hunt uses the following language: "The question is not exclusively whether the holders of the paper did in fact receive information of the dissolution. If they did, they certainly cannot recover against a retired partner. But if they had no actual notice, the question is still one of duty and diligence on the part of the withdrawing partner. If he did all that the law requires, he is exempt, although the notice did not reach the holders."[1]

§ 520. Liability of Retiring Partner Affected by Subsequent Conduct.— The conduct of the withdrawing partner may be such as not to entitle him to any benefit from a

[1] Lovejoy *v.* Spafford, 4 Cent. L. J., 82. See, also, the opinion of Judge Edmunds in Wardwell *v.* Haight, 2 Barb., 552; Bristol *v.* Sprague, 8 Wend., 423; Ketcham *v.* Clark, 6 Johns., 144; Pratt *v.* Page, 32 Vt., 13; Watkinson *v.* Bank of Penn., 4 Whart., 482; White *v.* Murphy, 3 Rich. L., 369.

published notice, even as against subsequent creditors of the firm who have had no prior dealings. As where the firm was composed of father and son, and the father withdrew, leaving the business in the hands of his partner and another son, with authority to continue the business in the old name, the father was held liable to a subsequent dealer who gave credit on the reputation of the partnership previous to the change, notwithstanding the fact that notice of the dissolution was duly published.[1] The ground of this decision was that, by permitting the continued use of his name, the father was estopped from denying his liability, as against one without actual notice of his withdrawal, who trusted the partnership on the strength of his apparent connection with the business.

§ 521. **Estoppel.**— In the case of Newcomet *v.* Brotzman,[2] the operation of the doctrine of estoppel was placed upon apparently broader ground. There the father was a member of a partnership which was dissolved by his purchase of the interest of his partner, and giving the entire business to the son, who had previously represented his father in the management, drawing his portion of the profits. After the firm was dissolved, the other partner remained in the store in the capacity of a clerk. There was no alteration made in the sign, and the new proprietor continued the business as before. Under this state of facts the court held that one subsequently giving credit to the original firm would be entitled to pursue his remedy against the former partners, regardless of whether notice of dissolution had been given or not.

§ 522. **Example of New Customer Entitled to Actual Notice.**— Another case surrounded by peculiar circumstances is that of Amidown *v.* Osgood.[3] Here there were no actual dealings prior to the dissolution, but at the time of one transaction there had been neither actual nor im-

[1] Speer *v.* Bishop, 24 Ohio St., 598.
[2] 69 Pa. St., 185.
[3] 24 Vt., 278.

plied notice given to the creditor. The goods sold were partially delivered, prior to the publication of the notice of dissolution, and while the original signs and all the external *indicia* of the continuance of the partnership remained. The subsequent transaction from which the obligation arose was based on the faith of the partnership credit, and it was held that, although the first dealing with the creditor was after dissolution, he was nevertheless entitled to the same notice as though the entire transaction had been completed during the actual continuance of the partnership.

§ 523. **Knowledge of Expiration of Partnership.**— A creditor who has knowledge at, or prior to, the time when the credit is given, that the partnership with which he deals will expire by limitation at a time certain, is bound by such knowledge to the same extent as though he had actual notice thereof when it occurred. Thus where one who knew that a partnership was formed to continue for a certain period of time, and during such continuance the firm employed an attorney or agent to make purchases for them, such person, selling to such attorney goods which were ostensibly purchased for the partnership, could not recover from the firm for anything sold after the expiration of the time to which the partnership was limited.[1]

§ 524. **Notice of Limited Partnership.**— The notice by which partners may exonerate themselves from future liability is not confined, however, to notice of changes in the constituency of the firm. There is an obligation upon each of the partners, implied by law, to answer for the contracts of each of his copartners, made and entered into on behalf of the firm. With respect to the business of the partnership the law implies a reciprocal agency, by which each may bind all the others. But the liabilities arising from this relation may be restricted by agreement between the parties, by forming what is known as limited partnerships, for the reason that the liability of one or more of the partners is limited to a

[1] Schlater *v.* Winpenny, 75 Pa. St., 321.

certain amount, or by restricting the power of one or more of the members to bind the others by contracts, or to incur obligations of any sort in the name of the firm. Such limitations or restrictions can only affect persons dealing with the firm, with notice thereof.[1] But those having notice would occupy no better position with reference to dealings beyond the scope of the liability assumed by, or the restrictions imposed upon, certain members of the firm, than though they dealt with any other agent who exceeded his limited authority.[2] Accordingly, where one of the members of a partnership executed a note on behalf of the firm for money borrowed ostensibly for the firm's use, the larger portion of which was so applied, and the party who took the note had received notice from a copartner of the maker that such maker had no authority to draw on the firm account, it was held by Lord Ellenborough that the holder of the note could not recover from the partner giving the notice.[3]

§ 525. **Special Partnership.**— So, where there was a stipulation between A., B. and C., who appeared to the world as copartners in business, that C. should neither participate in the profits nor share the losses, and should not be liable as a partner, it was held that C. was not liable as such to those who had notice of this stipulation.[4]

§ 526. **Restrictions and Limitations.**— There is necessarily a difference between the manner of giving notice of the dissolution of a partnership, and giving notice of restrictions upon the powers, or limitations upon the liabilities, of partners, or those who hold themselves out to the world as such. Notice of dissolution, as we have seen, may

[1] Pars. on Part., 98.

[2] Id., 99, and cases cited.

[3] Gallway *v.* Matthew, 10 East, 264. See, also, Brown *v.* Leonard, 2 Chit., 120; Le Roy *v.* Johnson, 2 Pet., 186; Gow on Part., 48, 49.

[4] Alderson *v.* Pope, 1 Camp., 404, note; Batty *v.* McCundie, 3 Car. & P., 202; Denny *v.* Cabot, 6 Met., 82; Bailey *v.* Clark, 6 Pick., 372; Boardman *v.* Gore, 15 Mass., 331; Baxter *v.* Clark, 4 Ired., 127; Dow *v.* Sayward, 12 N. H., 271; Langan *v.* Hewett, 13 Sm. & M., 122; Leavitt *v.* Peck, 3 Conn., 124; Monroe *v.* Conner, 15 Me., 178.

in certain cases be implied from circumstances,[1] or may be purely constructive in its character;[2] but with respect to a notice which contradicts all the appearances by which men are usually guided in their dealings with each other, sound policy would dictate that it should be actual, in the strict sense of the term, and the proof of it should be of the most satisfactory character.[3] If there were any difference between old and new customers it would seem that the latter should have the preference regarding the degree of knowledge to be brought home to them of the stipulations between the copartners, limiting their common law liabilities, or restricting their powers.

§ 527. **Assumption of Excess of Authority by One Partner.**— Where the contract is entered into or the obligation incurred by the partner, who, at the time, is acting beyond the scope of his authority, as conferred by the articles of copartnership, or restricted by private stipulation, such acts will not bind his copartners in favor of one having notice of the misconduct of the partner with whom he treats, when such act amounts to a fraud upon the partnership.[4]

§ 528. **Misapplication of Funds.**— When the excess of authority by one partner is in the misapplication of the funds of the partnership to satisfy a debt or demand against himself, or for his own benefit, the party with whom the transaction takes place, knowing that the funds are those of the firm, cannot avoid knowledge of their misapplication, and the obligations assumed will be void as against the partnership, how binding soever they may be upon the partner who commits the fraud.[5]

[1] *Supra*, § 485.

[2] *Supra*, § 513.

[3] Pars. on Part., 98.

[4] Connecticut River Bank *v.* French, 6 Allen, 313; Warren *v.* French, 6 Allen, 317; Sandilands *v.* Marsh, 2 B. & Ald., 673.

[5] Kemeys *v.* Richards, 11 Barb., 312; Burwell *v.* Springfield, 15 Ala., 273; Green *v.* Deakin, 2 Stark., 347; Story on Part., § 132.

§ **529. Effect of Dissolution Upon Guarantor.**— The effects of notice of dissolution of a partnership are not always confined to the parties having dealings, prior or subsequent, with the firm. Where advances are made to a copartnership, not upon faith in the firm's credit, but upon the strength of the guaranty of a third party, the guarantor cannot be held for advances made by the creditor, subsequent to his receiving notice that the partnership is dissolved.[1]

§ **530. Onus Probandi.**— When one attempts to escape the responsibility implied from his connection with the partnership in whose name the obligation is incurred, upon the ground that he has severed such connection, and notified the creditor, or that he had given antecedent notice of his non-liability, the authorities all seem to agree in casting the burthen of proof upon him in every instance.[2] If the circumstances require actual notice, it is necessary for him to allege and prove such actual notice. If the case admits of constructive notice, by publication in a newspaper, or by other notorious proclamation of the fact relied upon, he still has the affirmative of the issue upon the matter of notice, and until he makes at least a *prima facie* showing will be held liable as a partner.

[1] Cremer *v.* Higginson, 1 Mason, 323.
[2] Carmichael *v.* Greer, 55 Ga., 116.

II. Notice by Carriers Limiting Their Liability.

§ 531. Division of Subject.
532. Inception of Liability.
533. Cannot be Varied by Published Notice.
534. Liability at Common Law.
535. Different Methods of Giving Notice.
536. State of the Law in England.
537. Notice Must be Brought Home.
538. Posting Notices Insufficient.
539. Same.
540. Example of Insufficient Notice.
541. American Rule — Must be Clear and Explicit.
542. Limitation of Extent of Liability.
543. Notice on Back of Railroad Ticket.
544. Must be Seen and Understood.
545. Party Unable to Read Notice.
546. Taking Paper Containing Advertisement, Insufficient.
547. To Whom Given — Servant.
548. Printed in Bill of Lading, Insufficient.
549. Conflicting Notices.
550. Same.
551. Agent's Acts Governed by Notice to Principal.
552. General Doctrine in America — Cannot be Limited by Notice.
553. May be by Contract.
554. Notice and Assent.
555. Assent Must be Voluntary.
556. Same.
557. Views of Judge Redfield.
558. Notice Never Exempts from Negligence.
559. Example of Express Contract Held Inoperative.
560. Cases Arising Under English Statute.
561. Further Illustration of Same.
562. Notice of Arrival.
563. Will Terminate Liability as Carrier.
564. Reasonable Time for Removal After Knowledge of Arrival.
565. Classification of Conflicting Authorities.
566. Massachusetts, Illinois, Iowa.
567. Modification of the Rule in Massachusetts.
568. New Jersey, Vermont — Reasonable Time to Remove.
569. Additional Authorities.
570. New York, Michigan, Texas, New Hampshire and other States — Notice Required.
571. Carriers by Water — Notice Required.

§ 572. Comparison of Conflicting Views.
573. Rule Requiring Notice, Preferred.
574. Conflict Explained by Difference in Local Customs.
575. Rule Affected by Custom.
576. Waiver and Excuse.
577. Reasonable Time for Removal.
577*a*. Actual Notice — Opportunity to Remove Goods.

§ 531. Division of Subject.— The carriers' notices by which their liability is sought to be limited have reference — 1. To the notice by which they endeavor to qualify or restrict their responsibility, imposed by law, as special insurers of the articles committed to their charge. 2. The notice by which their responsibility as carriers is terminated.

§ 532. Inception of Liability.— An important matter for consideration in connection with notices of the former class is the inception of the carrier's liability. This usually takes place when the goods are delivered to the carrier for transportation, whether immediately taken upon the vessel or vehicle employed in their carriage, taken into a warehouse to await the carrier's convenience, or left upon a public dock or wharf, where it is usual and customary to deposit articles intended for transportation by the carrier in whose charge they are thus delivered.[1] But in order to hold the carrier to the onerous responsibility imposed upon him by common law, something more than the delivery of the goods to such carrier must appear. It is not enough that he is charged with their possession. They must be delivered to him in his capacity of carrier and none other. The articles delivered for carriage must be delivered for present transportation, and not to be held for a time, and shipped when further orders of the bailor are given to that effect.[2] If they are delivered for present storage and future shipment, although in the possession or under the control of the car-

[1] Merriam *v.* H. & N. H. R'y, 20 Conn., 354; Rogers *v.* West, 9 Ind., 400; Burrell *v.* North, 2 Carr. & Kir., 680; Boehm *v.* Combe, 2 M. & S., 172.

[2] Moses *v.* Boston & M. R. R. Co., 24 N. H., 71; Spade *v.* Hud. Riv. R'y, 16 Barb., 383; R. R. Co. *v.* Manuf. Co., 16 Wall., 318.

rier, they are not held by him as such, but only as a warehouseman, who is held to less strict accountability.[1]

§ 533. **Cannot be Varied by Published Notice.**— This rule as to the commencement of the carrier's liability is so well recognized that it cannot be abrogated by public notice. Thus, where a railroad corporation, having a warehouse for the storage of goods intrusted to it for present shipment, advertised that it would not be responsible for goods so left, except for injuries resulting from the negligence of its own servants, it was held that it was nevertheless liable for the value of goods left at its warehouse to be presently forwarded, which, while in store, were destroyed by an accidental fire.[2]

§ 534. **Liability at Common Law.**— The liability of common carriers, as fixed by the law of this country and England, is probably so well understood as to render unnecessary further comment or illustration than a statement of the general rule by which such liability is governed in respect to the goods committed to the carrier's charge. This rule is that such carriers will be liable for all damage and loss of goods during the carriage, from whatever cause, unless from the act of God, which is limited to inevitable accident, or from the public enemy.[3].

§ 535. **Different Methods of Giving Notice.**— The notice by which carriers seek to limit this liability is in some instances actually communicated to the shipper, and in others rests entirely upon declarations of the carrier's rules, made public by printed posters, signs, or the advertisement of their non-liability, in connection with the customary solicitation of public patronage. Another method adopted alike by railroad corporations and other carriers by land, and by carriers by water, is to print the notice of the exemption claimed upon the ticket of the passenger, or the receipt, way-

[1] O'Neill *v.* New York & Hud. Riv. R. R. Co., 60 N. Y., 138; Selway *v.* Holloway, 1 Ld. Raym., 46.

[2] Moses *v.* Boston & M. R. R. Co., 24 N. H., 71.

[3] 2 Redfield on Railways, 6, and cases there cited.

bill, or bill of lading, when engaged in the carriage of goods and chattels.

§ 536. **State of the Law in England.**— The state of the law upon this question in England prior to the legislation by which the responsibility of carriers has been settled upon a very reasonable basis in that country[1] may be illustrated by the case of Maving *v.* Todd,[2] where the vendor of goods in London forwarded them to the vendee in the country by a carrier from whom he had received notice that his liability for the safety of goods committed to his care for transportation was limited so as not to extend to a loss by fire. During the time the goods were in the possession of the carrier they were accidentally destroyed by fire, and, in deciding an action brought by the vendee to recover for their loss, it was held by Lord Ellenborough that, although the carrier was selected by the vendor, the vendee was bound by the selection, and, notwithstanding that the carrier was bound to receive the goods, he might make his own terms and exclude his liability for the loss of the goods altogether.[3]

§ 537. **Notice Must be Brought Home.**— But while the rule that notice was sufficient to restrict the carrier's common law liability prevailed in England, it was uniformly insisted by the courts that such notice should be brought home to the parties to be affected, or their agents. Thus,

[1] 11 Geo. IV. and 1 Wm. IV., c. 68; Railway & Canal Traffic Act, 17 & 18 Vict., c. 31, § 7.

[2] 1 Stark., 72.

[3] This learned jurist is reported to have expressed regret that the law presented such encouragement to negligence. In a case decided in the following year (1816) he says, in the course of his summing up to the jury: "If this action had been brought twenty years ago the defendant would have been liable. * * * It was found that the common law imposed upon carriers a liability of ruinous extent, and, in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that, under the terms of the present notice, if a servant of the carriers had, in the most wilful and wanton manner, destroyed the furniture intrusted to them, the principals would not have been liable. Leason *v.* Holt, 1 Stark., 186.

where it was sought to prove notice by publication in the "Gazette" and the London Times, it was held that, though the former was admissible, it would be weak unless supported by evidence that the plaintiff was in the habit of reading the paper, and the latter was excluded for the want of prior proof that the paper was taken in by him.[1]

§ 538. **Posting Notices Insufficient.**— So where printed notices were posted in the most conspicuous places, as in the office where the goods were delivered, it was held insufficient unless it actually came to the knowledge of the party or his agent. As where the porter sent to deliver the plaintiff's goods to the carrier saw a printed notice limiting the carrier's liability, and it was proven that such porter could read, this was held insufficient in the absence of proof that he had read the notice.[2]

§ 539. **Same.**— So, also, where the goods were delivered to a carrier's cart, sent around to receive them, for the defendant's wagon, and a printed notice that defendant would not be liable for packages beyond the value of £5, unless insurance was paid, was posted at his office, and cards containing a similar announcement had been circulated about the town; and an advertisement to the same effect had been published in the town paper; but there was no such notice on the cart, nor was it proved that plaintiff had read the newspaper, or seen the printed notices posted at the office or circulated through the town, it was held that the defendant had not given sufficient notice to discharge himself from his common law liability.[3]

§ 540. **Example of Insufficient Notice.**— Where the carrier fastened upon the door of his office, where parcels were received for carriage, a handbill, blazoning in the most conspicuous manner the advantages of his conveyances, and stating in small characters at the bottom that he would not be liable for packages above the value of £5 unless

[1] Leason *v.* Holt, 1 Stark., 186; Walker *v.* Jackson, 10 M. & W., 161.
[2] Kerr *v.* Willan, 2 Stark., 53; Davis *v.* Willan, id., 279.
[3] Clayton *v.* Hunt, 3 Camp., 27. See, also, Munn *v.* Baker, 2 Stark., 255.

entered as such and paid for accordingly, this was held not to be such notice as would bind those employing him as a carrier to submit to the terms imposed.[1]

§ 541. American Rule — Must be Clear and Explicit.— Where this rule is adopted in the United States the same strictness with reference to the character of the notice is required. Knowledge or information must in all cases be brought home to the party or his agents, and must be clear and explicit as to the class of risks from which exemption is claimed.[2] The *onus* of proving any qualification of the carrier's common law responsibility rests upon him, and consequently it would not only be essential for him to show that he has endeavored to inform the party by whom he is employed that he will not be liable for the loss or damage from which he seeks to exonerate himself, but he must also prove to the satisfaction of the jury that such information has been communicated to the party to be affected thereby.[3]

§ 542. Limitation of Extent of Liability.—Notices are often given by carriers for the purpose of limiting the extent of their liability by requiring notice from the shipper of the value of packages committed to their charge, with a view to fixing the cost of carriage. The doctrine that notice of such a regulation, when brought home to the shipper, will be binding upon him, seems to be more generally accepted in this country than where the notice amounts to an avowal of non-liability for the ordinary risks of transportation, without reference to the question of concealment of value. A regulation to the effect that the carrier will not be responsible for packages or articles of a certain description beyond a given value, unless such value be disclosed and the carriage paid for according to the rates for

[1] Butler *v.* Heane, 2 Camp., 415. See, also, Walker *v.* Jackson, 10 M. & W., 161; Gouger *v.* Jolly, 1 Holt, 317.

[2] Beckman *v.* Shouse, 5 Rawle, 179.

[3] See Verner *v.* Switzer, 32 Pa. St., 208; Laing *v.* Coldar, 8 Pa. St., 479; Bingham *v.* Rogers, 6 W. & S., 495; Atwood *v.* The Reliance Co., 9 Watts, 87; Edwards *v.* Cahawba, 14 La. An., 224.

such packages or articles, is supported upon the plainest principles of justice when applied to such commodities as might far exceed their apparent value.[1] Thus, where dogs, horses or other animals, or articles of personal adornment, are committed to the care of a carrier for transportation, it seems quite reasonable that such carrier should have a right to require a disclosure of their value where it exceeds the ordinary rate at which similar animals are held in the market, and to demand additional compensation for their carriage.[2]

§ **543. Notice on Back of Railroad Ticket.**— But notice of such a regulation, in order to be of binding force upon a shipper, must be actually communicated to him or his agents in connection with the matter.[3] It was accordingly held in Brown *v.* Eastern Railroad Co.,[4] that a notice printed on the back of a railroad ticket, and detached from the part which ordinarily contains all that is material for the passenger to know, to the effect that the company would not be liable for the baggage of passengers beyond a certain amount, unless the value was disclosed, would not be binding upon a passenger where such notice was not seen and read by him when the ticket was purchased; and that such printed notice would not raise a legal presumption that the ticket was purchased with a knowledge of the conditions, but the question of knowledge and assent on the part of the passenger would be for the jury.

§ **544. Must be Seen and Understood.**— The doctrine in Brooke *v.* Pickwick[5] is applicable to all such notices. It is

[1] Riley *v.* Horne, 5 Bing., 217; Wyld *v.* Pickford, 8 M. & W., 443; Clay *v.* Willan, 1 H. Blackst., 298; Izett *v.* Mountain, 4 East, 371.

[2] Harrison *v.* London, Brighton & So. Coast R'y Co., 2 B. & S., 122; Tyly *v.* Morrice, Carthew, 485; Cole *v.* Goodwin, 19 Wend., 251; Clay *v.* Willan, 1 H. Blackst., 298; Mech. & Tr. Bank *v.* Gordon, 5 La. An., 604; Orange Co. Bank *v.* Brown, 9 Wend., 85; Gibbon *v.* Paynton, 4 Burr., 2298.

[3] Cole *v.* Goodwin, 19 Wend., 251.

[4] 11 Cush., 97.

[5] 4 Bing., 218.

there laid down by Best, C. J., that it is not enough to post them conspicuously about the office or place of business of the carrier, where the shipper may see and read them. It is important that the customer should not only see, but understand, the notice, and the carrier should be to the pains to make him comprehend the restrictions and limitations upon his liability which he proposes to claim. And in the case of Kerr *v.* Willan,[1] on a motion for new trial, before a full bench, the court refusing the rule, and affirming the decision of Lord Ellenborough, said: "If the agent could not read he might hear, or, at all events, a handbill might be delivered to him, to be taken to his principal," and thus the notice be made effectual.[2]

§ 545. **Party Unable to Read Notice.**— So in an action brought to recover a quantity of coin, which plaintiff had placed in a trunk with his personal baggage, the whole being lost in transit over the defendant's line, the defense was that the defendant, a railroad corporation, had published a notice that it would carry fifty pounds of baggage for each passenger, and that passengers were "expressly prohibited from taking anything as baggage but their wearing apparel, which will be at the risk of the owner." Plaintiff had given no notice of the contents of his trunk, but had paid for extra weight, and, being a German, was unable to read defendant's notices, even if his attention had been specially directed to them. The corporation was held liable as an insurer, according to the rules of common law governing carriers, for the reason that it failed to show that the contents of the notices intended to

[1] 2 Stark., 53.

[2] In order for the carrier to limit the extent of his liability it is necessary that he either give the notice in a manner so it will be understood, or, if his objections are to a particular package on account of supposed concealment of the value of its contents, he must make inquiry; for if there is no concealment on the part of the shipper the carrier will be bound for its full value in case of loss. Macklin *v.* Waterhouse, 5 Bing., 212; Titchburne *v.* White, 1 Str., 145.

qualify its liability ever came to the knowledge of the plaintiff.[1]

§ 546. **Taking Paper Containing Advertisement, Insufficient.**— In Rowley *v.* Horne,[2] it was in evidence that plaintiff had regularly taken a weekly newspaper in which defendant's advertisements were inserted for over three years. This the court held insufficient to raise a legal presumption of plaintiff's knowledge of the contents of such advertisement, as it could not be intended that a party read all the contents of any newspaper he might take.

§ 547. **To Whom Given — Servant.**— In one case, plaintiff's trunk was deposited by the porter with a postmaster to be delivered to the driver of defendants' stage-coach. The doctrine was here acknowledged, that, had notice of any regulations limiting defendants' liability as common carriers been communicated to plaintiff or his servant, the porter, such notice would have qualified the carriers' responsibility. But the mere fact that the postmaster through whose hands the trunk passed to defendants' agent knew that defendants had posted notices "that they would not be accountable for any baggage unless the fare was paid and the same entered on the way-bill," would not affect plaintiff, as the postmaster could not be regarded as their agent.[3]

§ 548. **Printed in Bill of Lading, Insufficient.**— A condition printed in the bill of lading, that the owner assumes all risk, has been held no evidence of a contract limiting the liability of the carrier, where the bill was not seen and assented to by the owner, prior to the shipment.[4]

§ 549. **Conflicting Notices.**— Where a notice in large letters, written on a board and fastened up in the coach office, declared that the proprietors of the coaches would not be responsible for plate and jewels delivered for trans-

[1] Camb. & Amb. Railw. *v.* Baldauf, 16 Pa. St., 67.

[2] 3 Bing., 2.

[3] Bean *v.* Green, 12 Me., 422.

[4] Flavey *v.* Northern Transp. Co., 15 Wis., 129; Erie, etc., Transportation Co. *v.* Dater, 8 Cent. L. J., 293.

portation, however small the value, unless entered and paid for as such; but such proprietor also circulated a handbill stating "that he would not be answerable for any article above the value of £5, unless entered as such and paid for accordingly," it was held that the handbill might be presumed to contain the whole of the limitations upon the carrier's liability, which he intended to claim.[1]

§ 550. **Same.**— So, in Munn *v.* Baker,[2] where the carriers had given two public notices, one of which, limiting their liability as carriers, was printed in large letters, and posted in the defendants' counting-house and warehouse at the wharf, and the other was on a smaller paper, containing no such limitation, Lord Ellenborough was of the opinion that by the delivery of a notice without the limitation, the defendants had nullified the notice which contained the limitation. Having given two notices, they were bound by that least favorable to themselves.

§ 551. **Agent's Acts Governed by Notice to Principal.**— A hardship is sometimes worked by the rule which gives effect to limitations and restrictions upon the liability of common carriers, upon notice to the owner of the goods carried, irrespective of the assent of such owner, as required by most of the American cases. As where notice was communicated to one, whose agent, without any knowledge or information of the limited liability, sent a package of bank-bills to his principal by the carrier, and such package was lost. Here there could be no room for a presumption of assent to the terms of the notice from the fact that the package was intrusted to the carrier after the receipt of the notice, because the bills were not intrusted to the carrier by one who knew that such notice had been given; yet it was held that the carrier was exonerated because of notice to the principal.[3]

[1] Cobden *v.* Bolton, 2 Camp., 108.
[2] 2 Stark., 255.
[3] Mahew *v.* Eames, 3 B. & C., 601.

§ 552. General Doctrine in America — Cannot be Limited by Notice.— The weight of American authority, independent of statutory provisions, is decidedly against the doctrine allowing the liability of common carriers to be limited or restricted by mere notice.[1] Cases have even been interpreted by an able text writer as going the length of maintaining that carriers could not exonerate themselves from their general liability, either by notice brought home to the owner of goods, at the time they were delivered for carriage, nor even by express contract to that effect.[2]

§ 553. May be by Contract.— But the more prevalent opinion seems to be that carriers may exonerate themselves from the liability imposed by common law, by contract between the shipper and the carrier, though not by mere notice from the latter to the former.[3]

[1] Fish *v.* Chapman, 2 Ga., 349; Farmers & Mechanics' Bank *v.* Champlain Tr. Co., 23 Vt., 186; Jones *v.* Voorhees, 10 Ohio, 145; *Infra.*

[2] Redf. on Railways, § 159, ¶ 6; Cole *v.* Goodwin, 19 Wend., 251; Hollister *v.* Nowlen, 19 Wend., 234; Gould *v.* Hill, 2 Hill, 623; Cam. & Amb. R'y *v.* Belknap, 21 Wend., 354; Clark *v.* Faxton, 21 Wend., 153; Powell *v.* Myers, 26 Wend., 591.

[3] Steele *v.* Townsend, 37 Ala., 247; Camd. & Amb. R. R. Co. *v.* Belknap, 21 Wend., 354; Farmers & Mechanics' Bank *v.* Champlain Transp. Co., 23 Vt., 186; York Co. *v.* Central R. R., 3 Wall., 107; Walker *v.* Transp. Co., id., 150; Lee *v.* Marsh, 43 Barb., 102; Ill. Central R. R. Co. *v.* Morrison, 19 Ill., 136; Gott *v.* Dinsmore, 111 Mass., 45; Snider *v.* Adams Ex. Co., 63 Mo., 376; N. J. Steam, etc., Co. *v.* Merchants' Bank, 6 How., 344; Dow *v.* N. J. Steam, etc., Co., 11 N. Y., 485; Parsons *v.* Monteath, 13 Barb., 353; Fillebrown *v.* Railroad, 55 Me., 462; McMillen *v.* Railroad Co., 16 Mich., 79; Kimball *v.* Railroad, 26 Vt., 247; Davidson *v.* Graham, 2 Ohio St., 131; Adams Ex. Co. *v.* Haynes, 42 Ill., 89; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 Ill., 88; Camden, etc., R. R. Co. *v.* Baldauf, 16 Pa. St., 67; Farnham *v.* Railroad, 55 Pa. St., 53; Grace *v.* Ex. Co., 100 Mass., 505; Hoadley *v.* N. T. Co., 115 Mass., 304; Perry *v.* Thompson, 98 Mass., 249; Roberts *v.* Riley, 15 La. An., 103; Kollman *v.* Ex. Co., 3 Kan., 205; Boorman *v.* Ex. Co., 21 Wis., 152; Orndorff *v.* Adams Ex. Co., 3 Bush, 194; Adams Ex. Co. *v.* Guthrie, 9 Bush, 78; Adams Ex. Co. *v.* Loeb, 7 Bush, 501; McCann *v.* Railroad, 20 Md., 202; Mobile, etc., R. R. Co. *v.* Weiner, 49 Miss., 725; Southern Ex. Co. *v.* Moon, 39 Miss., 822; Evansville, etc., R. R. Co. *v.* Young, 28 Ind., 516; Virginia, etc., R. R. *v.* Sayers, 26 Gratt., 328; Smith *v.* Railroad, 64 N.

§ 554. **Notice and Assent.**—It is true that many of the adjudged cases in this country place the carrier's exemption from liability upon the ground of his having given notice to the shipper that he would not be held to the full measure of his common law liability in undertaking to transport certain property, and that the shipper has assented to the terms of such limited liability;[1] but this notice and assent amounts to nothing less than an agreement between the parties. If one party gives the other express notice that he will undertake the performance of a particular service, only upon certain conditions, and the other accepts the service expressly upon such conditions, there is nothing wanting to render this a matter of agreement between the parties to the arrangement, and such agreement will necessarily include the conditions upon which the service was performed, as well as the performance of the service itself.[2]

§ 555. **Assent Must be Voluntary.**—The reciprocal obligations arising from an undertaking by a common carrier to transport goods, has, however, been placed on higher grounds, in the case of a railroad corporation, than that of a mere voluntary service. It is held to be the *duty* imposed by law upon such carriers, to transport property for all persons indifferently. This is a service which they cannot refuse to perform, nor can they surround its performance with such conditions and restrictions of their responsibility as will compel shippers to release them from any obligation

C., 235; Michigan, etc., R. R. Co. *v.* Heaton, 37 Ind., 448; Baltimore, etc., R. R. Co. *v.* Skeels, 3 W. Va., 556; Camp *v.* Steamboat Co., 43 Conn., 333; Simon *v.* The Fung Shuey, 21 La. An., 363; Westcott *v.* Fargo, 63 Barb., 353.

[1] Oppenheimer *v.* U. S. Ex. Co., 69 Ill., 62; Field *v.* Ch. & R. I. R. R. Co., 71 Ill., 458.

[2] 2 Redfield on Railways, § 159, ¶ 2; Grace *v.* Adams Ex. Co., 100 Mass., 505; State *v.* Townsend, 37 Ala., 247; Magee *v.* The Railroad, 45 N. Y., 514; Long *v.* The Railroad, 50 N. Y., 76; Belger *v.* Dinsmore, 51 N. Y., 166; Kirkland *v.* Dinsmore, 62 N. Y., 171; King *v.* Woodbridge, 34 Vt., 565; Mulligan *v.* Railroad, 36 Iowa, 181; Evansville, etc., R. Co. *v.* Androscoggin Mills, 22 Wall., 594; Bank of Kentucky *v.* Adams Ex. Co., 93 U. S., 174.

imposed by law with reference to the care to be taken of the property while in their possession. The only manner in which they can be exonerated from their liability is by a free and full agreement of the parties.[1] In Illinois, at least, the courts insist upon something more than tacit assent on the part of the shipper. Mere acceptance of a receipt containing the stipulation relied on by the carrier will not serve the purpose. To bind the shipper it must appear that his attention was called to the limitation of liability, or that he knew and assented to it.[2]

§ **556. Same.**—With this view of the matter, it would seem that something more than the tacit assent of the owner of the goods carried would be requisite. This agreement, to render it binding, must have for its support, what is necessary in all contracts — a consideration.[3] If the owner of the goods may insist upon the carriage of his property by the carrier as a matter of *right*, and the carrier is bound to accept them for transportation as a correlative *duty*, subject to the responsibility imposed by law upon carriers, the performance of this positive duty could not be construed into a consideration for the contract by which the owner consents to a qualification of the carrier's liability. Unless there should be some consideration passing from the carrier to the owner of the goods, as abatement in the charges, or other advantage, which he was not positively entitled by law to demand, such a contract would possess no more validity than an agreement between the maker and the payee of a promissory note, past due, for the ex-

[1] Mich. Cent. R. R. *v.* Hale, 6 Mich., 243; McMill *v.* M. S. & N. I. R. R. Co., 16 Mich., 79; Adams Ex. Co. *v.* Guthrie, 9 Bush, 78; Messenger *v.* Penn. R. R. Co., 37 N. J. Law, 531; Brown *v.* Grand Trunk R. R., 54 N. H., 535.

[2] Adams Ex. Co. *v.* Haynes, 42 Ill., 891; Adams Ex. Co. *v.* Stattaners, 61 Ill., 184; Field *v.* Railroad, 71 Ill., 458: Anchor Line *v.* Dater, 68 Ill., 369. See, also, C. H. & D. R. Co. *v.* Pontius, 19 Ohio St., 221; Welsh *v.* Pittsburg, etc., R. Co., 10 Ohio St., 65; Gaines *v.* Union Tr. Co., 28 Ohio St., 418; Tel. Co. *v.* Griswold, 37 Ohio St., 301.

[3] 1 Pars. on Cont., 427, and cases cited.

tension of time, in consideration of the payment of a portion of the principal.[1]

§ 557. **Views of Judge Redfield.**— Judge Redfield, in his excellent work on Railways,[2] expresses views upon this subject which seem to lead to the foregoing conclusions. Says the learned author: "But a notice brought home to the owner of the goods, as evidence, merits a very different consideration in this species of bailment from any other where there is no obligation on the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not, but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, and where every one desiring goods carried has the option to have them carried without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights for present convenience or ultimate peace, the mere fact of such notice restricting the carrier's liability being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights. Perhaps, upon general grounds of inference, it might be regarded as more logical and more reasonable to infer that the carrier receded from an illegal pretension, than the owner of the goods from a legal one." [3]

[1] 1 Story on Prom. Notes, § 414, note.

[2] 2 Redf. on Railways, § 159.

[3] Where the receipt or bill of lading is relied on to limit the carrier's liability as a contract, it must have been given at the time the goods were received, or, if afterwards, its subsequent delivery must be under a general understanding. The carrier cannot make conditions after accepting the service. Gaines *v.* Tr. Co., 28 Ohio St., 418; Blossom *v.* Griffin, 13 N. Y., 569; Shelton *v.* Merchants' D. T. Co., 59 N. Y., 258; Pruitt *v.* Railroad, 62 Mo., 527; Bostwick *v.* Railroad, 45 N. Y., 712.

§ 558. Notice Never Exempts from Negligence.— Where it is admitted that carriers may limit their common law liability by notice to the owners of property carried, by specially enumerating the risks against which they decline to insure; and where there is such notice and assent as to amount to an agreement between the parties that the carrier shall be released from the burthens imposed by reason of their character of common carriers, the benefits of this exemption will not extend to losses which are the result of the negligence of the carrier or his servants.[1] Some of the cases cited take the ground that not only will notice be insufficient for the purpose of excusing negligence in the carrier, but that an express contract for that purpose will be equally unavailing, for the reason that such contracts are against public policy.[2]

[1] Cole *v.* Goodwin, 19 Wend., 251; Ashmore *v.* Steam Tow and Trans. Co., 28 N. J., 180; Riley *v.* Horne, 5 Bing., 217; Sleat *v.* Fagg, 5 Barn. & Ald., 342; Birkett *v.* Willan, 2 Barn. & Ald., 356; Bodenham *v.* Bennett, 4 Price, 31; Smith *v.* Horne, 8 Taunt., 144; Newborn *v.* Just, 2 Carr. & P., 76; Wyld *v.* Pickford, 8 M. & W., 443; Orndorff *v.* Adams Ex. Co., 3 Bush, 194; Rhodes *v.* Louisv. & Nashv. R. R. Co., 9 Bush, 688.

[2] Ashmore *v.* Penn. Steam Tow & Trans. Co., 28 N. J. (Law), 180; Cole *v.* Goodwin, 19 Wend., 251; Sager *v.* Portsm., S. & P. & E. R. R., 31 Me., 228; Camd. & Amb. R'y *v.* Baldauf, 16 Pa. St., 67; Bingham *v.* Rogers, 6 W. & S., 495; Penn. R'y Co. *v.* McCloskey, 23 Pa. St., 526; Baker *v.* Brinson, 9 Rich., 201; Reno *v.* Hogan, 12 B. Mon., 63; Hall *v.* Cheney, 36 N. H., 26; Powell *v.* Penn. R. R. Co., 32 Pa. St., 414; Kansas City, etc., R. Co. *v.* Simpson (Kan.), 2 Pac. Rep., 821; Jones *v.* Voorhies, 10 Ohio, 145; Wilson *v.* Hamilton, 4 Ohio St., 722; Cleveland, etc., R. Co. *v.* Curran, 19 Ohio St., 1; Cincinnati R. Co. *v.* Pontius, 19 Ohio St., 221; Union Ex. Co. *v.* Graham, 26 Ohio St., 595; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St., 315; Empire T. Co. *v.* Oil Co., 63 Pa. St., 14; American Ex. Co. *v.* Bank, 69 Pa. St., 394; School District *v.* Railroad, 102 Mass., 552; Commonwealth *v.* Railroad, 108 Mass., 7; Ketchum *v.* American, etc., Ex. Co., 52 Mo., 390; Read *v.* St. Louis, etc., R. Co., 60 Mo., 199; South, etc., R. Co. *v.* Henlein, 52 Ala., 486; Berry *v.* Cooper, 28 Ga., 543; Mobile, etc., R. Co. *v.* Hopkins, 41 Ala., 486; Ohio, etc., R. Co. *v.* Selby, 47 Ind., 471; Rose *v.* Railroad, 39 Ia., 246; Jacobus *v.* Railroad, 20 Minn., 125.

§ 559. Example of Express Contract Held Inoperative.— In an important case decided in the supreme court of the United States,[1] where an express carrier, by special contract with the transportation company, was allowed to carry packages upon their boats, under the immediate care and oversight of such expressman, with the express stipulation that all persons delivering parcels to the expressman for carriage should be notified that he alone was responsible for their safety, there was annexed to the receipt given by him for goods, the following notice, which was also required to appear in connection with his public advertisement: "Take notice, William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care, nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats, in which his crate may be and is transported, in respect to it or its contents at any time." The expressman had undertaken the carriage of a considerable sum in specie, for the bank, and the boat on which he was transporting it from New York to Boston, through the gross mismanagement of the company's agents and servants, was burned, and the specie totally lost. In pronouncing the opinion of the court, Mr. Justice Nelson gives the following able and satisfactory explanation of the rule governing the case: "The special agreement in this case under which the goods were shipped provided that they should be conveyed at the risk of Harnden, and that the respondents were not to be responsible to him, or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her

[1] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How., 344.

proper equipment and furniture, or in her management by the master and hands. This is the utmost effect that was given to the general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailments, § 570); nor was it allowed to exempt him for accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation. Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation. This rule, we think, should govern the construction of the agreement in question."

§ 560. Cases Arising Under English Statute.— By the English Railway & Canal Traffic Act,[1] the current of authority in that country is somewhat changed from what it was in the time of Lord Ellenborough, when he expressed regret at the encouragement given by the precedents to negligence.[2] By this act, notices, and even contracts exempting common carriers from liability, are made the subject of revision by the courts, as to the reasonableness of the conditions upon which the carriage is undertaken.[3] Under this statute it has been decided that a notice by a carrier by rail, assented to by the shipper, that in regard to live stock they would not be liable for any injury or damage howsoever

[1] 17 and 18 Vict., ch. 31, § 7.

[2] *Ante*, § 536.

[3] Peek *v.* North Staffordshire R'y Co., 10 H. L. Cas., 478; Lloyd *v.* Waterford & Limerick R'y Co., 9 Law T. (N. S.), 89; Allday *v.* Great West. R'y Co., 11 Jur. (N. S.), 12.

caused, was unreasonable, and would not excuse the company, where the loss occurred from a defect in a box in which they undertook to carry a horse.[1] Where the carrier gave notice that he would not be responsible for packages of a particular description, he was nevertheless held liable to the owner of one of such packages, which he undertook to transport, and delivered to the wrong person.[2]

§ 561. **Further Illustration of Same.**— In a case arising under the English Carriers' Act, the court, in determining whether the conditions upon which goods were accepted for transportation, or the special contract between the shipper and the carrier was reasonable, considered the whole matter brought before them, and held that a condition that the company would not be responsible for the loss, detention or damage of any package insufficiently or improperly packed was unjust and unreasonable, though it was admitted that regulations as to the time within which a claim for damages should be made belonged to a class which might be the proper subject of stipulation between the parties.[3]

§ 562. **Notice of Arrival.**— The notice of arrival, when required of common carriers, is a duty which is incidental to the peculiar circumstances by which the most extensive public carriers are prevented from actually delivering the articles transported to the immediate possession of the consignees. The instances are rare in which it is practicable for those engaged in carrying by water, to make personal delivery of goods carried on their vessels. The same may be said of carriers by rail. The best equivalent for such delivery is, when the goods have reached their place of consignment, to give notice to the consignee.

§ 563. **Will Terminate Liability as Carrier.**— Whether the giving of such notice of arrival be an absolute duty im-

[1] McManus *v.* Lancashire, etc., R'y, 4 H. & N., 327.

[2] Duff *v.* Budd, 3 Brod. & Bing., 177; Beck *v.* Evans, 16 East, 244; Bodenham *v.* Bennett, 4 Price, 31.

[3] Simons *v.* Great West. R'y Co., 37 Eng. L. & Eq., 286; London & N. W. R'y Co. *v.* Dunham, 18 C. B., 826.

posed upon the carrier or not, there can be no doubt that when a vessel has completed her voyage, and reached the port of delivery, or when the carrier by rail has reached the station to which the goods are consigned, such carrier, whether by land or water, cannot be held liable for the care and safe-keeping of the goods, as carrier, at the option of the consignee. It would be imposing an unconscionable burden upon them to say that they had no means by which they might put an end to the transit of the goods, short of personal delivery to the consignees at their several places of business, unless such places of business were at a convenient wharf or dock, or upon the immediate line of the railway. It has accordingly been held that carriers of this class may exonerate themselves from such liability, by giving reasonable notice to the consignee of the arrival of the articles transported.[1]

§ 564. **Reasonable Time for Removal After Knowledge of Arrival.**— And even when there is no direct notice from the carrier to the consignee that the goods have arrived, but knowledge of such fact is brought home to him, from whatever source derived, the carrier could only be held liable until the consignee had a reasonable time within which to remove the goods, after knowledge of their arrival.[2]

§ 565. **Classification of Conflicting Authorities.**— The rule as to the duty of carriers to give notice of the arrival of goods is by no means so uniform as that requiring the consignee to act at his peril upon such notice when given. Judge Cooley, in rendering the opinion of the court in McMillan *v.* Michigan Southern & Northern Indiana Railroad

[1] Chickering *v.* Fowler, 4 Pick., 371; Northern *v.* Williams, 6 La. An., 578; The Ship Grafton, Olcott's R., 43; Stowe *v.* N. Y., Bost. & Prov. R. R. Co., 113 Mass., 521; Robinson *v.* Chittenden, 14 N. Y. Sup. Ct., 133; Cope *v.* Cordova, 1 Rawle, 203.

[2] Norway Plains Co. *v.* Boston & M. R. R. Co., 1 Gray, 263; Redmon *v.* Steamboat Co., 46 N. Y., 583; Russell Mfg. Co. *v.* Steamboat Co., 50 N. Y., 121; Gleadell *v.* Thomson, 56 N. Y., 194; McAndrew *v.* Whitlock, 52 N. Y., 40; Crawford *v.* Clark, 15 Ill., 561.

Company,[1] divides the conflicting authorities upon this question, as respects carriers by railroad, into three classes: 1. Cases where it is held that the liability of the carrier ceases at the terminus of the route and the unloading of the goods, regardless of the giving of notice, or the time of removing the property. 2. Such as hold the carrier liable after arrival of the goods, and a reasonable time for the consignee to remove them, but requiring the consignee to take notice of such arrival. 3. Those cases where it is held that the carrier's liability continues until notice to the consignee, and a reasonable time thereafter to enable him to take possession of the goods. In the course of the opinion the learned judge takes occasion to say: "I am unable to discover any ground, which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden."[2] A brief review of the authorities will show that this question is decided so differently, in different localities, that the attempt to reconcile them must be utterly futile.

§ 566. **Massachusetts, Illinois, Iowa.**—In the state of Massachusetts the doctrine is laid down, where goods shipped by railroad and not called for on their arrival at the place of destination are unloaded and separated from the goods of other consignees, and are stored in suitable warehouses or depots provided by the carriers for their protection, that then the duty of the proprietors of the road, as carriers, is at an end. They have performed their entire contract. They have received and transported the goods to their destination, and the consignee not being present to receive them, they have been stored in safety, whence the con-

[1] 16 Mich., 79.
[2] Id., 108.

signee may take them in a reasonable time.[1] The same doctrine is declared in a later case by the same court, where it is said that the carrier's responsibility ends when the goods are taken from the car and placed on the platform; that if, on account of the unseasonable hour of their arrival, or for other cause, the owner is not present to receive them, they are stored in the railroad company's warehouse, the liability assumed is that of warehousemen, and they will only be held responsible for injury or loss through the negligence of the depositaries. The doctrine that, in order to exonerate themselves from their liability as carriers, railroad corporations were required to give notice of the arrival of goods, was expressly denied.[2]

§ 567. Modification of the Rule in Massachusetts.— The doctrine of the case last cited, as to the termination of the carrier's liability, is somewhat modified by later cases decided in the same state, wherein it is held that the duty of the common carrier by rail, with reference to the goods transported, includes unloading them with care, and if not delivered at once, storing them in a suitable and safe place for future delivery; but notice of arrival is not held requisite, nor is the liability of the railroad company for loss or damage occurring otherwise than by the negligence of its servants, at any time after such storage, admitted in either case.[3]

[1] Thomas *v.* Boston & Providence R. R. Co., 10 Metc., 472; Lamb *v.* Western R. R. Co., 7 Allen, 98. See, also, Porter *v.* Chicago & R. I. R. R., 20 Ill., 407; Richards *v.* M. S. & North Ind. R. R., id., 404; Chicago & Alton R. R. Co. *v.* Scott, 42 Ill., 132; Merchants' Disp. Tr. Co. *v.* Hallock, 64 Ill., 284; Mohr *v.* The C. & N. W. R. R. Co., 40 Ia., 579; Rothschilds *v.* M. C. R. R. Co., 69 Ill., 164; Barron *v.* Eldredge, 100 Mass., 455; Stowe *v.* Railroad, 113 Mass., 521; McCarthy *v.* Railroad, 30 Pa. St., 247; Shenck *v.* Propeller Co., 60 Pa. St., 109; Chicago, etc., R. Co. *v.* McCool, 26 Ind., 140; Southwestern R. R. *v.* Felder, 46 Ga., 433; Mobile, etc., R. R. *v.* Prewitt, 46 Ala., 63; Neal *v.* Railroad, 8 Jones (Law), 482.

[2] Norway Plains Co. *v.* Boston & Me. R. R., 1 Gray, 263.

[3] Session *v.* Western Railroad Corp., 16 Gray, 132; Rice *v.* Boston & Worcester Railroad Corp., 98 Mass., 212.

§ 568. New Jersey, Vermont — Reasonable Time to Remove.— In Morris & Essex Railroad Co. *v.* Ayres,[1] the distinction made between the rule governing carriers by wagon, carriers by water, and carriers by rail, is that the first is required to make personal delivery at the consignee's place of business; the second, from the fact that such personal delivery would be impracticable for them, are bound to give notice of the arrival of the vessel containing the goods; while the third, although incapable of delivering the goods to the consignee at his own door or place of business, is not required to give such notice, because of the regularity of the arrival of the trains. Their duty as carriers, however, is said to cease with their having the goods safely housed and ready for delivery, *allowing a reasonable time for the owner or consignee to remove them.* The same doctrine as to carriers by rail is perhaps more clearly and comprehensively stated by Judge Kellogg, in Blumenthal *v.* Brainard,[2] where it is said that their responsibility as carriers "continues after their arrival at the place of destination, until they are ready to be delivered at the usual place of delivery, and the owner or consignee has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them, so far as to judge from their outward appearance of their identity, and whether they are in a proper condition, and to take them away; and that it is the duty of the owner or consignee, under the contract of carriage, to take notice of the course of business at the station of delivery, and of the time of the arrival of the train, when his goods may be expected at the place of destination, and to be ready to receive them in a reasonable time after their arrival, and when in the common course of business they may fairly be expected to be ready for delivery." [3]

[1] 29 N. J. (Law), 393.

[2] 38 Vt., 402–13.

[3] See, also, Chicago, etc., R. Co. *v.* Bensley, 69 Ill., 630; Alabama, etc., R. Co. *v.* Kidd, 35 Ala., 209.

§ 569. **Additional Authorities.**— Other cases cited in support of the foregoing doctrine do not necessarily involve the question of notice, but favor holding the carrier to the full extent of his liability as such, not only until the goods have reached their destination, and are ready for delivery, but until the owner or consignee *has had a reasonable opportunity to take them away.*[1] In neither of the cases cited was the question of notice necessary to be determined. In both instances the goods were unladed at so late an hour in the day that it would have been impossible to remove them, and, before the warehouse where they were stored was opened for their delivery, the goods were lost.[2]

§ 570. **New York, Michigan, Texas, New Hampshire and other States — Notice Required.**— In the state of New York, the rule may be regarded as settled in perfect harmony with the views of Judge Cooley in McMillan *v.* Mich. South. & North. Ind. R. R. Co.[3] In the case of McDonald *v.* The Western Railroad Corp.,[4] it is laid down that notice to the owner or consignee of the arrival of the goods, and a reasonable time and opportunity to remove them after such notice, will come in lieu of the personal delivery required of carriers by wagon, in order to change the character of the liability from that of carrier to the less onerous responsibility of warehouseman. This doctrine is accepted in other states.[5]

[1] Moses *v.* Boston & Me. R. R. Co., 32 N. H., 523; Wood *v.* Crocker, 18 Wis., 345; The Eddy, 5 Wall., 481; Goodwin *v.* Railroad, 58 Barb., 195.

[2] Redf. on Railways, § 183, ¶ 9.

[3] 16 Mich., 79, cited *ante*, § 565.

[4] 34 N. Y., 497.

[5] Smith *v.* Nashua & L. R. R., 27 N. H., 86; Morgan *v.* Dibble, 29 Tex., 107. See, also, Blumenthal *v.* Brainard, 38 Vt., 402; Ouimit *v.* Henshaw, 35 Vt., 604; Wood *v.* Crocker, 18 Wis., 345; Lemke *v.* Railroad, 39 Wis., 449; Maignan *v.* Railroad, 24 La. An., 333; Jeffersonville, etc., R. Co. *v.* Cleveland, 2 Bush, 468; Hirsch *v.* Quaker City, 2 Disney (O.), 144; Morris, etc., R. *ads.* Ayres, 29 N. J. L., 393; Leavenworth, etc., R. *v.* Maris, 16 Kans., 333.

§ 571. Carriers by Water — Notice Required.— When the carriage is by water, the rule seems more uniform, except as modified or affected by local custom. The doctrine that notice to the consignee is necessary to exonerate the carrier, whose duty, so far as actual transportation is concerned, is limited to carrying the property from port to port, is quite generally recognized in this country; in fact, may be said to be the acknowledged rule in all the states, unless the principles laid down in the Massachusetts cases cited may be regarded as in conflict.[1]

§ 572. Comparison of Conflicting Views.— The rule adopted in some of the states, holding the carrier by rail to the full measure of accountability *as* carrier, until a reasonable time has elapsed for removal, is certainly founded upon better reasons and supported by higher authority than the doctrine by which the goods are held at the risk of the consignee, barring the carrier's gross negligence, from the moment they are removed from the cars. The latter doctrine proceeds upon the anomalous theory that the carrier, upon receiving the goods, enters into an undertaking, not only to transport them as a common carrier, but, when they have reached their destination, to store and hold them as a warehouseman. The opposite doctrine recognizes the possible impracticability of removing the goods immediately upon their arrival, and continues the carrier's accountability until the consignee or owner may have an opportunity, in the usual course of business, to take them into his own possession. But both doctrines, as regards the question of notice, are founded upon an assumed regularity and punctuality in the arrival of freight trains, and the supposition that the owner or consignee of chattels shipped as freight have received antecedent information that the property would arrive by a particular train. Were this uniformly true,

[1] Price *v.* Powell, 3 N. Y., 322; Fiske *v.* Newton, 1 Den., 45; The Mary Washington, Chase, Dec., 125; Smith *v.* Nashua R. R. Co., 27 N. H., 86; Rome R. R. *v.* Sulivan, 14 Ga., 277; Houston & Tex. Cent. R'y Co. *v.* Hodde, 42 Tex., 467; Union Steamboat Co. *v.* Knapp, 73 Ill., 506.

there could be little difficulty in reconciling some of the decisions which seem so conflicting. But where large quantities of freight are delivered to the carrier, and he is unable to forward the same promptly, in order to enable the consignee to anticipate, with any degree of certainty, the arrival of goods shipped as freight, the consignor, or some one acting at the place of shipment, would be compelled to take notice of the actual loading of the property and the departure of the train. This is a duty which, we have seen, is not incumbent upon shippers.[1] The goods are in the possession of the carrier, and his liability as such commences from the time they are delivered to him for present forwarding, whether the actual transit commences at once or on a subsequent day. The consignor, therefore, cannot ordinarily advise the consignee with certainty that the goods were placed upon a certain train, which departed on a certain day and would arrive on a certain day. Any such information from him, unless he goes out of his way to obtain it, must be a matter of guess work. If, as is usual, the duty of forwarding the goods is intrusted to the carrier, any advice as to their arrival would properly come from him. Should the carrier so advise the owner or consignee, the latter would have notice, and there would no longer be room for controversy.[2]

§ 573. **Rule Requiring Notice, Preferred.**—For the reason, therefore, as so well expressed by Judge Cooley in the case heretofore cited,[3] that "the man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to employ the railroad company in any other capacity than that of carrier," and for the further reason that the duty of giving notice of arrival would be light compared to that of keeping constant watch upon the movements of freight

[1] *Ante*, § 453 *et seq.*

[2] Opinion of Judge Breese, in Chicago & Alton R. R. Co. *v.* Scott, 42 Ill., 138.

[3] 16 Mich., 105.

trains; and because the knowledge of this simple duty is much more easily communicated to a few common carriers, so that they may regulate their business accordingly, than it would be to bring home to every one to whom property might be transported by rail, knowledge of the opposite regulation; and on account of the impolicy of removing the incentives to diligence and care in selecting officers and servants of prudence and integrity by corporations controlling large quantities of the property of individuals intrusted to them, as well as on account of the analogy between carriage by rail and by water, the better doctrine is that which continues the carrier's liability as special insurer until due notice or knowledge of the arrival of the goods is brought home to the owner or consignee, and a reasonable time thereafter, during business hours, within which to remove them.[1]

§ 574. Conflict Explained by Difference in Local Customs.— The only ground upon which the conflicting decisions of different courts, upon this question, can be reconciled in order to render them consistent with the same method of reasoning, is by taking into account the different circumstances and the different customs of those communities whose courts rule adversely to each other.[2] The courts of any particular state may have settled the law in a manner suitable to their own condition, and in view of the peculiarities surrounding their local railroad traffic, while in

[1] Green & C. Navigation Co. *v.* Marshall, 48 Ind., 596; Houston & Texas Cent. R'y Co. *v.* Hodde, 42 Tex., 467; Rawson *v.* Holland, 47 How. (N. Y.) Pr., 292; Erskine *v.* Steamboat Thames, 6 Mo., 371; The Tybee, 1 Woods, 358; Fenner *v.* Buffalo & State Line R. R. Co., 44 N. Y., 505; The Mary Washington, Chase, Dec., 125; Price *v.* Powell, 3 N. Y., 322; The Paytona, 2 Curtis, 21.

[2] Smith *v.* Nashua Railroad, 27 N. H., 86; Gibson *v.* Culver, 17 Wend., 305; Ostrander *v.* Brown, 15 Johns., 39; Chicago & Rock Island R. R. Co. *v.* Warren, 16 Ill., 502; Rome R. R. *v.* Sulivan, 14 Ga., 277; Hill *v.* Humphreys, 5 Watts & Serg., 123; Mich. Cent. R. R. Co. *v.* Ward, 2 Mich., 538; Kohn *v.* Packard, 3 La., 224; Quiggin *v.* Duff, 1 M. & W., 174; Angell on Carriers, § 313; Hyde *v.* Navigation Co., 5 T. R., 389.

another state an opposite conclusion may be reached for the reason that this method of transporting goods is more or less certain and regular as there carried on.

§ 575. **Rule Affected by Custom.**—A local custom of the place of delivery, of which the consignee or owner has notice, may very materially modify or enlarge his rights with respect to notice of the arrival of goods, whether carried by water, rail, or by wagon.[1]

§ 576. **Waiver and Excuse.**—The duty of giving such notice is not so imperative that it may not be waived by contract, or even by the conduct of the owner or consignee. And like every other kind of notice, the party required to give it may be excused from doing so. Thus, where the consignee of the goods had within sixteen days prior to their arrival taken up her abode about four miles distant from the place of destination, prior to which time she had resided in another state, and no notice was given to the railroad company or any of its officers of her place of residence, which, upon reasonable inquiry, they were unable to ascertain, the property being destroyed by fire while in the company's warehouse after a reasonable time for its removal, it was held that the company was only liable as warehousemen, and the loss being through no fault of theirs they were discharged from all responsibility.[2] So the carrier has been excused from giving notice to such consignee when he resided at a considerable distance from the place of destination, and no one was present when the goods arrived to receive them or take notice of their arrival.[3] So, also, where usages and customs of the community where the goods are received is not to give notice of the arrival of goods, and the consignee

[1] The Tybee, 1 Woods, 358; The Richmond, 1 Biss., 49; Farmers' & Mechs. Bank *v.* Champlain Trans. Co., 16 Vt., 52; Huston *v.* Peters, 1 Met. (Ky.), 558.

[2] Pelton *v.* Rensselaer & Saratoga R. R. Co., 54 N. Y., 214; The Mary Washington, Chase, Dec., 125.

[3] Northrop *v.* Syracuse, B. & N. Y. R. R. Co., 3 Abb. App. Dec. (N. Y.), 386; Fenner *v.* Buffalo & State Line R. R. Co., 44 N. Y., 505.

had sufficient notice of the custom, it may be regarded unnecessary.[1]

§ 577. **Reasonable Time for Removal.**— What has been said with reference to "reasonable time" suggests the question: What time would be considered reasonable, in order to allow of the removal of property from the possession of the carrier at the place of delivery? This is a question of fact which can receive no definite answer here, because there is no rule of law governing it more certain than that it will depend upon the circumstances and the business customs of the place of delivery. But it is not to be understood that the time allowed to a consignee or owner, after notice, to claim the goods may be materially enlarged or extended by circumstances affecting him in a manner peculiar and distinct from that in which other residents of the place are affected. Neither the special emergencies of his own private business, nor any misfortune which might befall him in particular by which he would be prevented from responding to the notice as promptly as might be reasonably expected from other residents of the vicinity, could be urged as an excuse for his delay so as to affect the question of the reasonableness of the time of notice.[2] Nor could the distance of his residence or place of business from the station, dock or wharf where freight is discharged make any material difference in this respect. The time in general regarded as reasonable would be such as might in reason and justice be deemed sufficient for any resident of the vicinity to come for the goods with the usual appliances for cartage or drayage to be had under ordinary circumstances.[3] To enter into a nice computation of the exact distance between the owner's or consignee's residence and the station or

[1] Gibson *v.* Culver, 17 Wend., 305; Ostrander *v.* Brown, 15 Johns., 39; Loveland *v.* Burk, 120 Mass., 139; Van Santvoord *v.* St. John, 6 Hill, 157; Farmers', etc., Bank *v.* Champlain Trans. Co., 16 Vt., 52; Dixon *v.* Dunham, 14 Ill., 324; Shade *v.* Payne, 14 La. An., 453.

[2] Moses *v.* B. & M. R. R., 32 N. H., 532, 541.

[3] Hedges *v.* The Railroad, 49 N. Y., 223.

wharf where the goods are to be delivered, in every instance, and to inquire narrowly into the time required to travel over such distance, could result in nothing but confusion. The vague generality of the rule can only be reduced to certainty and uniformity by a line of decisions such as have sufficed under the law merchant to settle definitely the period within which notice of the dishonor of commercial paper must be given.[1]

§ 577a. **Actual Notice — Opportunity to Remove Goods.** It is difficult to separate the question of notice from that of the opportunity to remove the goods. The reason the consignee is entitled to notice is that he may have this opportunity. If he acquires a knowledge of the fact by other means than a personal notice, he will not be heard to complain that he was not notified. The notice being a substantial rather than a technical right, it should be actual, if not express. The publication of the arrival of the goods would not take the place of notice, unless the published notice were read by the consignee.[2] So where the notice is sent through the postoffice, the carrier takes the risk of its being delivered.[3] The opportunity to remove the goods after notice embraces other considerations than that of time, though this is of importance, as we have seen.[4] The carrier's liability does not cease until the goods have been placed in a position to be handled by the consignee without unreasonable inconvenience.[5] The notice should be so timed as to give the consignee an opportunity to remove the goods on a regular business day.[6]

[1] See *post*, ch. X, pt. III.
[2] McKeon *v.* See, 4 Rob. (N. Y.), 449; Kohn *v.* Packard, 3 La., 225.
[3] Solomon *v.* S. B. Co., 2 Daly (N. Y.), 104.
[4] *Supra*, §§ 564, 577.
[5] The Eddy, 5 Wall, 481; The Ben Adams, 2 Ben., 445.
[6] Russell Mfg. Co. *v.* Steamboat Co., 50 N. Y., 121.

III. Landlord and Tenant.

§ 578. Notice to Quit — Reciprocal Right.
579. Division of Subject.
580. Statutory Provisions.
581. Nature of Tenancy Requiring Notice.
582. From Year to Year.
583. Growing Out of Possession Under Contract.
584. Occupancy with Owner's Consent.
585. Holding Over Term.
586. Lease Void Under Statute of Frauds.
587. Implied Agreement Sufficient.
588. When Payment of Rent Not Essential.
589. Possession by Mortgagor After Forfeiture.
590. General Tenancy at Will.
591. Termination of Strict Tenancy at Will.
592. Mere Occupant Not Entitled to Notice.
593. Contract to Purchase After Original Trespass Will Not Entitle to Notice.
594. Trespasser Negotiating for Lease Not Entitled to Notice.
595. Bailiff or Servant of Owner Not Entitled to Notice.
596. Tenancy Not Created by Holding Over Term.
597. Tenant for Life of Another Not Entitled to Notice.
598. Contesting Landlord's Title Not Entitled to Notice.
599. Grantee of Mortgagor Not Entitled to Notice.
600. Tenancy at Will or by Sufferance.
601. Payment of Rent Without Tenancy.
602. Owner of Premises May Elect.
603. Holding Over Under Agreement for New Lease.
604. Proof of Tenancy from Year to Year.
605. Burthens and Benefits Equally Divided.
606. Increase of Rate.
607. Time of Notice.
608. Time Regulated by Statute.
609. Notice Must Expire at Commencement of New Term.
610. Tenancy by the Quarter.
611. Tenant from Month to Month.
612. Principal and Accessorial Subject of Demise.
613. The Different Kinds of Uncertain Tenancies.
614. Circumstances by Which it May be Determined.
615. By Whom Notice Given.
616. Joint Lessees or Lessors.
617. Partners.
618. One Giving Notice as Agent of Co-tenant.
619. Agent Must Have Authority at the Time.

§ 620. Agency Must Extend to the Duty Undertaken.
621. When Authority Inferred.
622. Notice by Corporation.
623. By Receiver.
624. When by Tenant.
625. When by Landlord
626. To Whom Given.
627. Joint Tenants — Tenants in Common — Partners.
628. Notice to Corporation.
629. Form and Sufficiency.
630. Address of Written Notice.
631. What Notice to Contain.
632. Statement of Cause Required.
633. Time Mentioned in General Terms.
634. Tenant from Week to Week.
635. Must Not Demand Possession "Forthwith."
636. Undue Strictness Not Required.
637. Description.
638. Substantial Accuracy Alone Required.
639. Illustration of Sufficient Certainty.
640. Service of Notice.
641. May be Waived.
642. Voluntary Surrender.
643. Parol Surrender and Acceptance.
644. Offering to Let Not Waiver.
645. Parol Surrender Must Go Into Immediate Effect.
646. Verbal License to Surrender Tenancy from Year to Year Inoperative.
647. Defects in Notice May be Waived.
648. Waiver of Rights Under Notice.
649. Will Not be Presumed from Acceptance of Rent by Unauthorized Person.
650. Mere Permission to Remain After Notice No Waiver.

§ 578. Notice to Quit — Reciprocal Right.— One of the most familiar modes by which the relation of landlord and tenant may be severed is by a notice, from one to the other, of an intention to terminate the tenancy. This is what is known as a *notice to quit;* and where the circumstances and relations of the parties render such notice necessary, it becomes a reciprocal right, or the correlative duty of either party, as he may desire to perpetuate the relation, or seek to terminate it. Neither the landlord nor the tenant can be

summarily deprived of his rights under the tenancy without due notice.[1]

§ 579. **Division of Subject.**— The order in which the several branches of the subject will be here presented is as follows: 1. What cases of tenancy render such notice necessary in order to terminate them, and what kinds of tenancy may be terminated without notice. 2. The time of giving notice to quit. 3. By whom given. 4. To whom given. 5. Its form and sufficiency. 6. The manner and mode of service. 7. Waiver and excuse.

§ 580. **Statutory Provisions.**— The character of the tenancy entitling either the landlord or the tenant to insist upon the continuance of the relation, until terminated by notice from the other party, is, to a very great extent, affected by local legislation. It is not intended here to follow closely the capricious changes and modifications of the common law, for the purpose of showing with particularity the kinds of tenancy requiring notice in each state. It will be sufficient to point out the common law rule, and its application to particular cases, and to set out the principles of a general nature applicable alike to tenancies at common law and under local statutes.

§ 581. **Nature of Tenancy Requiring Notice.**— The cases in which notice is required can be included in no general description better than what would be understood by *tenancies of uncertain duration.* The most common example being a tenancy from year to year, to be renewed or terminated at the option of either party, with the end of any year. The reason given for the rule requiring notice in order to terminate such a tenancy is, that it would be contrary to the contract to turn the tenant out in the middle of the year, and so, if he be allowed to hold over, it may fairly be inferred, from the landlord's acquiescence, that he intends to continue the lease for another year.[2]

[1] Hall *v.* Wadsworth, 28 Vt., 410; Barlow *v.* Wainright, 22 Vt., 88.

[2] Logan *v.* Herron, 8 Serg. & R., 459; Bedford *v.* McElherron, 2 id., 49; Doe *v.* Stennett, 2 Esp., 716; Moshier *v.* Reding, 12 Me., 478; Den *v.*

§ 582. **From Year to Year.**— And so, where premises were leased for the term of one year, and an indefinite period thereafter, at a fixed annual rent, and under this lease the tenant entered and occupied, this was a tenancy from year to year; and the tenant dying, his interest in the realty passed as a chattel to his personal representatives, who thereby became tenants from year to year, and liable, as such, to the payment of the yearly rent until they discharged themselves from the obligation by giving notice of their intention to terminate such tenancy.[1]

§ 583. **Growing Out of Possession Under Contract.**— So, also, where one comes into possession under a contract for a lease, or a contract to purchase, and there is subsequent payment of rent, this will be held sufficient to create a tenancy from year to year, which can only be terminated by notice.[2] And in one case, where the party entering under such a contract of purchase had not paid rent, he was held to be a tenant from year to year, and entitled to notice to quit before he could be ejected.[3] There, however, the situation of the parties with reference to the property was exceptional. The covenantor, who forcibly dispossessed the covenantee for non-payment of the purchase money, was unable to show title in himself, but claimed that the purchaser was estopped from denying his ownership upon the familiar ground that the tenant would not be heard to dispute his landlord's title.[4] After thus assuming the position of landlord for his own advantage, he could not be heard to deny the relation between himself and tenant, for the

Adams, 12 N. J. (Law), 99; Doe *v.* Watts, 7 D. & E., 83; Cobb *v.* Stokes, 8 East, 358; Grant *v.* White, 42 Mo., 285; 4 Kent's Com., 111–114.

[1] Pugsley *v.* Aiken, 11 N. Y., 494.

[2] And so held where the payment of rent was by the month, but the former tenancy was by the year, though the administrator, whose control ceased at the end of the year, promised that thereafter the tenancy should be from month to month. The contract extended beyond the duration of his authority. Burbank *v.* Dyer, 54 Ind., 239.

[3] Moshier *v.* Reding, 12 Me., 478.

[4] See Taylor on Landlord and Tenant, § 629.

reason that the latter entered under a contract of purchase, instead of a lease.

§ 584. **Occupancy with Owner's Consent.**—There seems no doubt that any sort of occupancy of the premises, with the consent of the owner, where the latter, by his acts, or even by silent acquiescence, recognizes the occupancy as held under himself, for a period of uncertain duration, except in certain cases of tenancy at will or by sufferance, to be noticed hereafter, would create between the parties the relation of landlord and tenant, and entitle each to notice of its determination.

§ 585. **Holding Over Term.**—Where the tenancy to be terminated by notice arises by the tenant's holding over after the expiration of the original term, there is the same reason for the rule as to notice to quit, whether the original term be for one year or a shorter period. If a tenancy under lease for one year be convertible into a tenancy from year to year, by the continuance of the tenant's occupancy after the expiration of his term, with the implied consent of the landlord, by the same rule, a tenant for one quarter, or one month, will, in case of holding over, be regarded, for the purposes of notice, as a tenant from quarter to quarter, or from month to month, as the case may be.[1] But this character of occupancy is generally regulated by statute, according to the nature and situation of the property held. Where the property is used only for agricultural purposes, requiring a yearly letting in order to render it available for the tenant's use, and the duration of such tenancy is rendered uncertain by the expiration of the original term and the continued occupancy of the premises, the subsequent holding is regarded as under an implied agreement running from year to year. Where, however, the premises are situated in a city or village, in the absence of such a lease as the statute prescribes, or such express terms as may

[1] Blumenburg *v.* Myres, 32 Cal., 93, 96; Wilkinson *v.* Hall, 3 Bing. (New Cases), 508, 530.

be necessary to limit the duration of the tenancy to a specific period, it is treated as running for a shorter term, in general from month to month.[1]

§ 586. **Lease Void Under Statute of Frauds.**— A tenant holding under a lease void under the statute of frauds, may, for the purposes of notice, be regarded as a tenant from year to year. Thus, where a parol lease of land was made for a term of years, at a stated rent, although by the statute declared to be a tenancy at will, its terms would regulate the rent to be paid, and the time of year when the tenant is to quit the possession of the premises, and before the landlord can maintain ejectment or other proceeding to regain possession he will be required to give notice to quit.[2]

§ 587. **Implied Agreement Sufficient.**— It is not essential, in order to establish the relation of landlord and tenant, so as to require notice to terminate it, that possession of the premises should be taken under a positive agreement of any sort. A subsequent payment of rent will be sufficient to create such a tenancy as to property occupied by a tenant for years beyond the boundaries of the land included in his lease.[3]

§ 588. **When Payment of Rent Not Essential.**— But the payment of rent, in the absence of an express agreement, has not always been regarded by the courts as essential to the creation of a tenancy from year to year. Thus, where it appeared that the tenant had taken possession of the premises with the consent of the owner, who died during such occupancy, and the tenant, while in possession, made improvements, but paid no rent, nor was any reserved by

[1] Sprague *v.* Quinn, 108 Mass., 553; Prindle *v.* Anderson, 19 Wend., 391; Coffin *v.* Lunt, 2 Pick., 70; Ellis *v.* Paige, id., 71, note.

[2] Thurber *v.* Dwyer, 10 R. I., 355; Barlow *v.* Wainright, 22 Vt., 88; Silsby *v.* Allen, 43 Vt., 172; Gleason *v.* Gleason, 8 Cush., 32; Doe *v.* Bell, 5 T. R., 471; Clayton *v.* Blakey, 8 T. R., 3; Schuyler *v.* Leggett, 2 Cow., 660. And so where the tenancy is under a lease void as being made by an agent in his own name. Murray *v.* Armstrong, 11 Mo., 209.

[3] Jackson *v.* Wilsey, 9 Johns., 267.

the landlord in his life-time, it was held that the tenant could not be summarily dispossessed without notice.[1]

§ 589. **Possession by Mortgagor After Forfeiture.**— So where there is a common law mortgage of the premises, and the mortgagor is permitted by the mortgagee to remain in possession without any express agreement as to the term for which he shall occupy, except as fixed by the maturity of the obligation thereby secured, the mortgagor has been regarded by high authority as in possession under such an implied agreement as to entitle him to be considered as a general tenant at will, and, as such, entitled to notice to quit.[2]

§ 590. **General Tenancy at Will.**— The relation upon which the right to notice depends is recognized as existing between the landlord and tenant, where there is a *general tenancy at will*, as distinguished from a *strict tenancy at will*. The former species is that which grows out of the tenant's holding over after the expiration of the original term;[3] an entry with the consent of the landlord and a lease rendered void by the statute of frauds;[4] the occupancy of the premises for an indefinite period, under a contract, express or implied, to pay rent;[5] and even where the land is occupied and improved by the tenant under an implied agreement with the landlord, from year to year, without the special reservation of rent.[6]

[1] Den *v.* Mackay, 2 N. J. (Law), 419; Jackson *v.* Laughhead, 2 Johns., 75, where it is laid down generally that "no person who holds land by another's consent, for an indefinite period, ought ever to be evicted by ejectment at the suit of such party, without previous notice to quit." See, also, Jackson *v.* Bryan, 1 Johns., 322; Jackson *v.* Green, 4 Johns., 186; Jackson *v.* Niven, 10 Johns., 335; Bedford *v.* McElherron, 2 Serg. & R., 49.

[2] Jackson *v.* Hopkins, 18 Johns., 487.

[3] *Supra*, § 585.

[4] *Supra*, § 586.

[5] *Supra*, §§ 583, 587.

[6] *Supra*, § 588.

§ 591. Termination of Strict Tenancy at Will.— Where a tenancy at will is terminated by notice from the landlord, it may operate as the inception of a tenancy of a different character. Thus where a tenant strictly at will received three months' notice to quit, and held over under an implied agreement for rent, this was held to create a tenancy from year to year, commencing with the date of the notice, and requiring six months' notice prior to the end of the first year thereafter to entitle the landlord to maintain an action for the possession.[1]

§ 592. Mere Occupant Not Entitled to Notice.— Where the relation of landlord and tenant does not exist between the owner of the fee and the occupant of the premises, there is no necessity for notice from either party. This relation being one arising by contract, express or implied, cannot be forced upon either party against his will. So where one is a mere trespasser upon the land of another, he is not entitled to notice to quit.[2] Nor is notice necessary where the term is fixed.[3]

§ 593. Contract to Purchase After Original Trespass Will Not Entitle to Notice.— For reasons somewhat different, one who obtains possession of the lands of another, and the original trespass is practically condoned by the owner of the fee, who enters into a treaty with the occupant to convey the land, and it is subsequently held by the occupant under such contract of purchase, this will not create the relation of landlord and tenant.[4] There being no express promise to pay rent, it could only be claimed upon the ground that the use and occupation raised an implied promise to that effect. But where there is an express agreement proven as the foundation of the occupancy, there can be no different promise implied by law. An express

[1] Bradley *v.* Covel, 4 Cow., 349.
[2] Taylor on Land. and Ten., § 468.
[3] Young *v.* Smith, 28 Mo., 65.
[4] Jackson *v.* French, 3 Wend., 337.

contract of purchase being sufficient upon which to predicate the occupancy by the covenantee, he enters and holds, not as a tenant, but as a *quasi* owner.[1]

§ 594. Trespasser Negotiating for Lease Not Entitled to Notice.— Upon similar grounds to the above, where one obtained possession of a house without the privity or consent of the owner, and afterwards entered into negotiations for a lease, but the parties failing to agree, the negotiations never ripened into a contract, it was properly held that this did not establish between the parties the relation of landlord and tenant, and that the latter might be dispossessed without antecedent notice to quit.[2]

§ 595. Bailiff or Servant of Owner Not Entitled to Notice.— Mere possession with the consent of the owner does not create this relation, even when such possession is under no express contract of purchase. The occupant may hold the possession as the servant or bailiff of the tenant in fee. As, in the case of Jackson *v.* Sample,[3] where the land had been occupied for some twenty years under a written agreement by the occupant to "hold, keep and preserve the possession," etc., of the land in question "to and for" the owner and his heirs, it was held that such occupancy would not raise any implication of such a contract as would entitle the occupant to notice from the owner to quit the possession.[4]

§ 596. Tenancy Not Created by Holding Over Term.— Holding over after the expiration of the term originally

[1] Harris *v.* Frink, 2 Lans. (N. Y.), 35; Tucker *v.* Adams, 52 Ala., 254; Carpenter *v.* United States, 17 Wall., 489; S. C., 6 Ct. Cl., 156; Doe *v.* Baker, 2 Dev., 270; Smith *v.* Stewart, 6 Johns., 46; Jackson *v.* Moncrief, 5 Wend., 26; Doe *v.* Sayer, 3 Camp., 8; Glasscock *v.* Robards, 14 Mo., 350. But see Jackson *v.* Rowan, 9 Johns., 330, where it is held that one entering under a contract of purchase cannot be treated as a wrong-doer and ejected without notice or demand; also Right *v.* Beard, 13 East, 210; Twyman *v.* Hawley, 24 Gratt., 512.

[2] Doe *v.* Quigley, 2 Camp., 505; Grant *v.* White, 42 Mo., 285.

[3] 1 Johns. Cas., 231.

[4] Doe *v.* Watts, 7 D. & E., 83; Cobb *v.* Stokes, 8 East, 358; Jackson *v.* Parkhurst, 5 Johns., 128; Williams *v.* Deriar, 31 Mo., 13.

fixed by contract does not in every instance create such a general tenancy as will entitle the occupant to notice to quit. Thus, where the original term is for one year, notice not being required to terminate the tenancy, it comes to an end with the expiration of the year, and primarily the tenant, by continuing in possession, becomes a wrong-doer, and may be summarily dispossessed. In order to give such tenant the *status* of a rightful occupant of the premises, there must be a subsequent payment of rent or other recognition of such tenancy by the landlord. The tenant cannot, by sheer force of his own obstinacy in refusing to surrender at the expiration of the term, enlarge the character of his tenancy.[1] And even where the tenant had held over for two years, during which time the owner remained silent, this was held insufficient to raise the presumption of his consent to such holding over on the terms of the original lease.[2]

§ 597. **Tenant for Life of Another Not Entitled to Notice.**— Under a statute by which a tenant at sufferance was entitled to one month's notice to quit, it was held that a tenant for the life of another, holding over after the death of *cestui que vie*, was not entitled to any notice whatsoever, but might be ejected as a trespasser.[3]

§ 598. **Contesting Landlord's Title Not Entitled to Notice.**— So a tenant who undertakes to defeat his landlord's title by attornment to a stranger, or, while in possession, accepts a conveyance in fee from one who claims adversely to the party under whom such tenant holds, is not entitled to notice, but may be dispossessed upon demand and refusal to surrender as any other wrong-doer.[4]

§ 599. **Grantee of Mortgagor Not Entitled to Notice.**— We have seen that, as between the mortgagor and the mortgagee, the former is, when in possession, in the absence of express stipulations to that effect, such a tenant at will as

[1] Allen *v.* Jaquish, 21 Wend., 628; Rowan *v.* Lytle, 11 Wend., 616.
[2] Den *v.* Adams, 12 N. J. (Law), 99; Smith *v.* Littlefield, 51 N. Y., 539.
[3] Livingston *v.* Tanner, 14 N. Y., 64.
[4] Sharpe *v.* Kelley, 5 Den., 431; Clarke *v.* Crego, 47 Barber (N. Y.), 599.

to be entitled to notice to quit.[1] But where the mortgagor, in possession under such implied tenancy at will, makes an absolute conveyance to another, his grantee does not succeed to his rights with respect to notice.[2] The reason given by the learned judge who rendered the opinion in this case, for this distinction, was that "the sale itself is an act of disloyalty." There must be a privity of estate between the owner and the occupant to entitle the former to notice, which is wholly wanting where he comes in by purchase from the mortgagor, who himself was at most a tenant at will.[3]

§ 600. Tenancy at Will or by Sufferance.— For similar reasons the same rule applies to a tenant from year to year coming in under the mortgagor after the date of the mortgage. He is a tenant at will in the strictest sense, or a mere tenant by sufferance. He cannot be said to hold under the mortgagee unless the latter recognizes his possession in the most unequivocal manner, as by acceptance of rent, or some similar act equally significant in its import, by which it may be inferred that there is an acceptance of the tenant in lieu of the mortgagor.[4]

§ 601. Payment of Rent without Tenancy.— As we have seen, the rule generally recognized with reference to a tenant holding over after the expiration of his term is that, if such holding is with the consent, express or implied, of his landlord, it creates a general tenancy at will, which can only be terminated by notice;[5] and that the subsequent payment of rent furnishes the strongest evidence of an implied agreement between the parties, in the absence of proof of an express stipulation.[6] But exceptional cases have arisen,

[1] *Supra*, § 589.

[2] Jackson *v.* Hopkins, 18 Johns., 487.

[3] Jackson *v.* Stackhouse, 1 Cow., 122.

[4] Thunder *v.* Belcher, 3 East, 449; Denn *v.* Rawlins, 10 East, 261; Rockwell *v.* Bradley, 2 Conn., 1; Den *v.* Bennett, 4 Ired. (N. C.), 122.

[5] *Supra*, § 585 *et seq.*

[6] *Supra*, § 587.

where the occupant of the premises has been permitted to remain in possession with the consent of the owner, and on payment of rent, without creating such a tenancy at will as to require notice to terminate it. Thus, where a servant was occupying the master's house, and, upon a termination of his service, was permitted to continue in possession until the condition of his wife's health was such as to admit of her safe removal, this was regarded as a mere license, depending upon a future contingent event, and did not create the relation of tenant, either at will or by sufferance, and notice to quit was held unnecessary.[1]

§ 602. Owner of Premises May Elect.— Where the tenant holds over his term, and before the landlord has done anything by which he would be estopped either from asserting or denying the tenancy at will, it is optional with him whether the relation of landlord and tenant shall be continued between them. He may have extended the privilege of remaining in possession as a mere license, depending for its duration upon a contingent future event.[2] Or he may have received rent, or done some other act equally expressive of his assent to the continuation of the tenancy, in either of which events he will have parted with his option in the matter for the time being. But when the end of the term is reached, and nothing is said or done by the landlord, the tenant, by remaining in possession, has thereby given expression to his intentions respecting the tenancy, and it remains for the landlord to elect to hold him for a new term, or eject him as a trespasser.[3] And this option is not affected by the tenant's refusal to accept a new lease, or otherwise expressing his dissent, subsequent to the expiration of his term.[4]

§ 603. Holding Over Under Agreement for New Lease. Where a tenant remains in possession under an agreement

[1] Doyle *v.* Gibbs, 6 Lans. (N. Y.), 180.
[2] *Supra*, § 601.
[3] Noel *v.* McCoory, 7 Coldw., 623.
[4] Schuyler *v.* Smith, 51 N. Y., 309.

with the landlord for a new lease, whether such agreement be express or implied, at the yearly, quarterly, or monthly rate of his original term, not only does this create a tenancy at will of the character requiring notice to quit, but the character of such tenancy will not be changed by the landlord's failure to carry out an agreement to make repairs. It will continue an estate at will until such lease is executed.[1]

§ **604. Proof of Tenancy from Year to Year.**— When the agreement between the parties for a continuation of the relation of landlord and tenant for an indefinite period is by express stipulation, it is proved as any other contract. When it rests altogether on inference, whether there is an implied contract of letting is a question of fact for the jury.[2]

§ **605. Burthens and Benefits Equally Divided.**— That feature of the law which gives the landlord his election to hold as a tenant at will one who holds over his term, or to treat him as a trespasser, seems at a glance to give the landlord an undue advantage. It enables him to increase the yearly rent over that of the expired term, as a condition of his assent to the continuance of the tenancy, without giving the tenant the corresponding advantage of insisting upon a reduction of the rate as a condition of the renewal of his tenancy. But it must be remembered that the holding over is the voluntary act of the tenant. It will be seen, when we come to consider the *time of giving notice*, that with respect to the termination of uncertain tenancies, the rights and duties are divided between landlord and tenant with tolerable impartiality.

§ **606. Increase of Rate.**— When there is a tenancy at will, from whatever cause it has arisen, as it is necessary to give notice to quit for a certain time, depending upon the length of the original term, it would seem to be equally requisite to give notice, for the same time, of an intention to demand an increase of rent, and, by a parity of reason-

[1] Emmons *v.* Scudder, 115 Mass., 367.

[2] Chamberlin *v.* Donahue, 44 Vt., 57.

ing, for the tenant to give notice for the same time of an intention to demand a reduction; for, although the tenant holding for a term may, by silently holding over, be bound to pay an increased rent, of which he has received notice a short time before the expiration of his term,[1] the case would necessarily be different with a tenant whose tenancy can only be terminated by notice. In the latter case his continued occupancy could not be interpreted as an assent to the demand of the landlord for the higher rate.

§ 607. **Time of Notice.**— The length of time for which notice must be given, in order to terminate a general tenancy at will, depends upon the character of the tenancy, whether from year to year or for shorter periods with indefinite renewals.[2] At common law, where the tenancy is from year to year, the notice is required to be for six months;[3] and by "six months" is meant six calendar months, or half a year.[4]

§ 608. **Time Regulated by Statute.**— But even where statutory provisions have not interposed to fix a different time, the six months' rule, in respect to tenancies from year to year, has not been universally adopted in this country by the courts of the different states.[5] Added to this conflict of authority as to the common law rule, there is a great diversity in local statutes varying the times for which notice must be given, from three months to fourteen days, which statutes are subject to annual or biennial alteration.

§ 609. **Notice Must Expire at Commencement of New Term.**— But the question of *time* relates to other considerations, in connection with the notice to quit, than that of the number of days or months elapsing between the giving of the notice and the time therein fixed for the vacation of the

[1] Hunt *v.* Bailey, 39 Mo., 257; Adriance *v.* Hafkemeyer, id., 134.

[2] Coffin *v.* Lunt, 2 Pick., 70; Ellis *v.* Page, id., 71 (note); Doe *v.* Scott, 6 Bing., 362; Kemp *v.* Derrett, 3 Camp., 510.

[3] Right *v.* Darby, 1 T. R., 159.

[4] Doe *v.* Porter, 3 T. R., 13; Den *v.* McIntosh, 4 Ired., 291.

[5] Rising *v.* Stannard, 17 Mass., 282; Logan *v.* Herron, 8 S. & R., 459.

premises. It has reference to the date of giving the notice, and the intervening time between that and the end of the year, or other period of holding within which the notice is given. In this respect, the rule as to time is more uniform. It is not sufficient, where six or any other number of months' notice is required, that it is given at any time, and to expire upon any day which happens to suit the convenience of the party giving it. The notice to quit at the end of six months gives the tenant the right to occupy the premises for that time; and if the expiration of the notice is not until the anniversary of the commencement of the tenancy, the notice will be ineffectual.[1]

§ 610. **Tenancy by the Quarter.**— So, where the tenancy was from three months to three months, it was held that the notice should be for three months ending at the close of any quarter, reckoning from the date of entry. It was not sufficient that notice to quit at the end of three months from the date of the notice was given, but the three months must intervene between the date of the notice and the end of the quarter.[2]

§ 611. **Tenant from Month to Month.**— So, also, where a party entered under an agreement to accept a lease for twenty months and subsequently refused to accept the lease, he was held to be a tenant at sufferance, and on the payment of a month's rent subsequent to his entry, he became a tenant from month to month, commencing from the date of his entry; and to dispossess him, the landlord was required to show one month's notice at the end of some month, reckoning from the date of entry.[3] And the same rule is applicable to a tenancy from week to week.[4]

[1] Doe *v.* Miller, 2 Car. & P., 348; Bay State Bank *v.* Kiley, 14 Gray, 492; Hultain *v.* Munigle, 6 Allen, 220; Doe *v.* Lea, 11 East, 312.

[2] Kemp *v.* Derrett, 3 Camp., 510.

[3] Anderson *v.* Prindle, 23 Wend., 616; Doe *v.* Hazell, 1 Esp., 94; Pricket *v.* Ritter, 16 Ill., 96; Gunn *v.* Sinclair, 52 Mo., 327. It is held in some cases, where the rent is payable monthly in advance, that notice may be given on the first of the month, and is to expire on the first of the month next ensuing. Walker *v.* Sharpe, 14 Allen, 43.

[4] Doe *v.* Scott, 6 Bing., 362.

§ 612. Principal and Accessorial Subject of Demise.— The time of giving the notice is occasionally involved in uncertainty arising from circumstances that cast doubt upon the actual date of entry. A party may have leased the premises with the right of entry upon a portion at one time and the right to enter another portion at another time. In such an event, to ascertain the date of commencement of the occupancy, the question to be determined is, which of these two portions of the property was the principal or substantial, and which the accessorial, subject of demise. This has been held to be a question of fact.[1] However, where the facts ascertained were that the tenant's entry upon all that portion of the premises except the land intended for tillage was on a day named in the lease, but he was allowed to enter the tillage land on an earlier day in order to plow, it was concluded, as a matter of law, that his tenancy commenced with his subsequent entry and occupation of the house and other buildings, and not from his prior entry for the mere purpose of plowing the tillage land.[2]

§ 613. The Different Kinds of Uncertain Tenancies.— Although there is considerable unanimity among authorities as to the time when notice to quit must be given, and when it should expire, in cases where the character of the tenancy is regarded as the same, still there seems to be some contrariety of view as to the kind of tenancy created by a particular kind of holding; that is, whether it be from year to year, from quarter to quarter, or from month to month. The reasonable rule is laid down in Anderson *v.* Prindle,[3] that where one entered under a parol contract to lease for a term of one year and eight months, and remained in possession, paying rent *by the month*, without such lease, this created a tenancy from month to month. The effect which is here given to time of payment of rent is denied in a case decided in Missouri.[4] Here the entry was under a parol

[1] Doe *v.* Howard, 11 East, 498.
[2] Doe *v.* Spence, 6 East, 120; Doe *v.* Watkins, 7 East, 551.
[3] 23 Wend., 616.
[4] Scully *v.* Murray, 34 Mo., 420.

lease for years, admitted to be void under the statute of frauds, and a payment of rent by the month; it was nevertheless held to be a tenancy from year to year. In the opinion in this case, an earlier case by the same court is cited with approval, but there nothing is disclosed as to the times of paying rent.[1] It is held, however, in Ridgely *v.* Stillwell,[2] where the tenant entered and paid rent by the month, without either a written or parol lease, or contract for a lease for any term whatsoever, that this was constructively a tenancy from year to year. In rendering the opinion the learned judge says: "So, a tenancy from month to month, or for any aliquot part of a year, may be created by express contract, or perhaps be implied from circumstances; but the circumstance that rent is payable monthly, or quarterly, or yearly, or half-yearly, does not show that the holding is not yearly. In the absence of any other proof, the legal presumption remains that the tenancy is a yearly one." The question raised here seems to be one of evidence, and it is decided that the mere payment of rent by the month, in the absence of corroborative circumstances, will not be sufficient to prove a monthly tenancy. There are, doubtless, other circumstances of a more convincing character than the mere recurrence of rent day. Nevertheless, when the premises are held for a period of uncertain duration, whether as the result of holding over the original term, entry under a void lease, or under a parol contract for a lease which is never executed, or by whatever manner tenancies at will of this sort may be created, when there is no stronger evidence of a tenancy from year to year, the fact that the rent is paid monthly would be sufficient to carry conviction to an ordinary mind that the holding was from month to month.

§ **614. Circumstances by Which it May be Determined.**— But the countervailing circumstances by which the periodical payment of rent, as evidence of the periods from which the premises are rented, may be overcome, are seldom

[1] Kerr *v.* Clark, 19 Mo., 132.
[2] 25 Mo., 570.

wanting when the payment of the rent does not fairly express the will of the parties. The habits and customs of the locality; the general conduct of the parties, with reference to the property, and above all, the nature of the subject of demise, and the manifest use for which it was intended, would all have a bearing upon the question of the length of the term for which the premises were occupied. It would be difficult to believe that one would occupy a farm as tenant from month to month, or for any term shorter than a year, even though the rent were paid by the month or by the quarter. Where to occupy the premises profitably or comfortably it became necessary to make extensive improvements, or to set up cumbersome and expensive machinery, and the premises were let with a view to the making of all necessary changes, the payment of rent by the month would hardly be sufficient evidence of a monthly tenancy.

§ **615. By Whom Notice Given.**— It having been already stated that the notice to quit may and should be given by either landlord or tenant, in the event that a termination of the tenancy is desired by either,[1] it only remains to show, with respect to the party from whom notice should come, how circumstances may render a notice to quit valid, which does not proceed directly from the one in whose behalf it is given. The circumstances by which any other than direct notice is authorized are chiefly such as grow out of the relations between parties as joint tenants, tenants in common, copartners, or principal and agent.

§ **616. Joint Lessees or Lessors.**— As to the effect of notice from one or two or more joint lessors or lessees, or from any number less than all, upon the opposite party, there is some conflict, but the weight of authority seems to be that such notice must come, either directly or indirectly, from all, in order to be binding upon the party notified, as to the entire interest represented by the opposite parties.[2]

[1] *Supra*, § 578.

[2] Right *v.* Cuthell, 5 East, 491; Doe *v.* Chaplin, 3 Taunt., 120; Goodtitle *v.* Woodward, 3 B. & Ald., 689. *Contra*, Doe *v.* Summersett, 1 B. & Ad., 135.

Thus where a notice to quit was given by two of three joint lessors, it was held insufficient to terminate the entire tenancy, so as to enable the three lessors to join in summary proceedings; although it would be sufficient as to the interests of those giving the notice.[1] And tenants in common, whether lessors or lessees, would possess no greater authority with respect to the interests of each other than would joint tenants.

§ 617. Partners.— Where, however, the joint lessors or lessees are partners in trade, and the subject of the demise is partnership property, they are placed upon a different footing, in respect to their relative rights, from that occupied by ordinary joint tenants or tenants in common. Notice, therefore, by one in the firm name would be sufficient to bind the partners.[2] The reason why it is so strongly insisted that the notice must come from the party whose rights are sought to be enforced thereby, is that the party notified is entitled to a notice upon which he can act with safety.

§ 618. One Giving Notice as Agent of Co-tenant.— But even when the co-tenants in whose names the notice is given do not sustain towards each other the relation of partners, notice from one will be sufficient, if given in the name and by authority of his co-tenants.[3] Where a notice is given by one joint tenant or tenant in common, for himself and co-tenants, it derives its force and validity, not by reason of the co-tenancy, but from the special authority conferred upon the acting party. He acts as the agent of the others, and his exercise of authority will, in all essential respects, rest upon the general doctrine of agency.

§ 619. Agent Must Have Authority at the Time.— Nevertheless, there is one essential difference between notices to quit, given by an agent, and notices of a general character communicated by the same means. In general,

[1] Pickard *v.* Perley, 45 N. H., 188.
[2] Doe *v.* Hulme, 2 Mann. & Ry., 433.
[3] Taylor on Land. and Ten., § 479.

where notice is given by one in the name of another, and the pretended agent acts without authority previously conferred, such acts may be rendered valid and binding by a subsequent ratification of the assumed agency by the party in whose behalf the notice was given.[1] So far from this being the prevalent doctrine respecting the kind of notices under consideration, it is generally laid down that, as the rights and duties of the party notified depend upon the validity of the notice to quit, to be effectual for the purpose of determining the tenancy, it must be given by one possessing authority when he gives such notice, or whose act is ratified by the principal at the proper time for giving it.[2] If unauthorized when given, it depends upon subsequent ratification for its life, and unless ratified a sufficient time before the period fixed for quitting, the party so notified will not have the notice to which he is by law entitled.

§ 620. **Agency Must Extend to the Duty Undertaken.**— Where notice is given by one as agent of another, it is not sufficient that there should be subsisting between them the relation of principal and agent. The agency must extend to the particular duty undertaken, or the notice will be as ineffectual as though coming from any other intermeddler. Thus, where an agent appointed merely for the purpose of collecting rents undertakes to dispossess a tenant by notice to quit, the latter is neither bound to recognize such notice, nor can he safely take advantage thereof, in order to terminate the tenancy.[3]

§ 621. **When Authority Inferred.**— When the one giving the notice has been clothed with authority to let the premises, and is depended upon by the owner to provide suitable tenants, his authority to give notice to any particular tenant to quit might reasonably be inferred. And when the tenant

[1] See *post*, ch. IX, part III.

[2] Doe *v.* Walters, 10 B. & C., 626; Pickard *v.* Perley, 45 N. H., 188; Doe *v.* Goldwin, 1 G. & D., 463; Brahn *v.* Jersey City Forge Co., 38 N. J. L., 74; *post*, ch. IX, part III.

[3] Doe *v.* Mizem, 2 Mood. & R., 56.

is represented by an agent whose duty it is to provide premises suitable for the purposes of his principal, the tenancy may be terminated by notice from him, but notice from an agent of an agent will not be recognized without the principal's approval.[1]

§ 622. **Notice by Corporation.**— When the notice is given on behalf of a corporation, it seems almost needless to say that it should come from an officer of such corporation; and whether the giving of such notice falls within the scope of his authority or not, the tenancy may be thereby terminated if the act be approved in time by the corporation.[2]

§ 623. **By Receiver.**— A receiver, appointed by a court of chancery to take charge of real estate, with general authority to let lands from year to year, does not act with respect to the property committed to his charge in the capacity of an agent of the owner, but as an officer of the court, and, under his general authority, may terminate the tenancy by notice to quit, given in his official capacity.[3]

§ 624. **When by Tenant.**— Where the notice is to the landlord, it should come from his immediate tenant or his tenant's assignee, between whom and himself there is some privity of contract or estate. The notice could not properly come from the under-tenant to the landlord, though his tenancy might be affected by notice passing between the tenant under whom he holds, and the owner of the fee.[4]

§ 625. **When by Landlord.**— Where the notice is from the landlord, it must be given to his immediate tenant, or to the assignee of such tenant, for the same reason expressed in the next preceding section, in respect to notice from the tenant to the landlord. And it is not important that the tenant to be notified be in actual possession of the premises at the time the notice is given. If he continues to pay the

[1] Doe *v.* Robinson, 3 Bing. N. C., 677.

[2] Roe *v.* Pierce, 2 Camp., 96.

[3] Doe *v.* Read, 12 East, 57.

[4] Pleasant *v.* Benson, 14 East, 234; Taylor on Landlord and Tenant, § 481.

rent, notice should be given to him, though the premises be occupied by another.[1]

§ 626. **To Whom Given.**—Although notice from the landlord should be given to the one recognized as his immediate tenant, and not to one who is simply a sub-lessee or under-tenant, from the mere fact that the latter is the only one in actual possession of the premises, yet where the tenant who originally entered under the landlord has abandoned, or given up the possession, and another has entered and occupies apparently in the same manner and to the same extent as his predecessor, he may be treated by the landlord as assignee of the original tenant, and served with notice to quit.[2] Where the tenant undertakes to put an end to the tenancy by notice, it must be given to his immediate landlord, or the one to whom he pays rent, or his agent. If it be an under-tenant, his purpose will not be accomplished by giving notice to the owner of the premises, or one under whom his own landlord holds as tenant.[3]

§ 627. **Joint Tenants — Tenants in Common — Partners.**— It has been laid down that where two or more are in possession of the premises as joint tenants or tenants in common, a notice addressed to all and served upon one would raise a presumption that the notice reached his co-tenants;[4] and it has even been held that a verbal notice to one of two joint tenants would suffice to terminate the tenancy as to both.[5] But it is difficult to see why tenants in common, or joint tenants, should be affected by notice given *to* a co-tenant under circumstances where they would not be affected either to their advantage or disadvantage by a notice proceeding *from* the same co-tenant, without their authority.[6] There can be no doubt, however, that where

[1] Tucker *v.* Baker, 10 Johns., 270.

[2] Doe *v.* Williams, 6 B. & C., 41; Doe *v.* Murless, 6 M. & S., 110.

[3] Taylor on Land. and Ten., § 481.

[4] Doe *v.* Watkins, 7 East, 551; Taylor on Land. and Ten., § 481.

[5] Doe *v.* Crick, 5 Esp., 196.

[6] See *ante*, § 616 *et seq.*

the parties to be notified are jointly interested in the subject of the demise, either as lessors or lessees, and are partners with respect to the property, that notice to one would be notice to all, especially where the notice was given ostensibly to both or all of such partners.

§ 628. **Notice to Corporation.**— A corporation, whether as landlord or tenant, can only be reached with notice through its authorized officers. But it might mislead to say that the notice should be *to* the officer, though he is unquestionably the proper one to serve. There may be several officers either of whom could accept service of the notice, but the notice should be given to the corporation itself; that is, it should be addressed to the corporate body and not to its official representative.[1]

§ 629. **Form and Sufficiency.**— As to what is necessary to constitute a notice sufficient in form, the requirements of the common law are not very exacting. It may be verbal or written,[2] though in this respect there have been such statutory changes of the law that now the notice is generally required to be in writing.[3]

§ 630. **Address of Written Notice.**— Much that has reference to the form and sufficiency of a notice to quit has already been suggested in treating of the *time* of giving notice, and *by whom* and *to whom* it should be given. Where the notice is, as is generally required, in writing, it should of course be addressed to the party to be affected thereby, and should be properly signed by the party giving it, or in his name by his agent; but slight and unimportant errors or omissions in these respects will not destroy its effect. It is of more importance that the notice should go to the right party than that it should be properly addressed to him.

[1] *Ante*, § 616 *et seq.*; Doe *v.* Woodman, 8 East, 228.

[2] Doe *v.* Wrightman, 4 Esp., 5.

[3] Parol notice of six months, to terminate a tenancy from year to year, has been held void, as in contravention of the statute of frauds. Johnstone *v.* Huddlestone, 4 B. & C., 922.

§ **631. What Notice to Contain.**— Whether the notice be given under the provisions of a statute, or as required at common law, it would not be sufficient should it fail to express with reasonable exactness the day on which the premises are required to be vacated; for although the law requires that notice shall be given, to go into effect at a particular time, as at the end of the year, the quarter, or the month, it is essential that the notice should itself be sufficiently specific to designate the date of its expiration.[1]

§ **632. Statement of Cause Required.**—When the notice is given to a tenant, under a statutory provision for nonpayment of rent, which may be for a shorter time than that provided for putting an end to tenancies at will, or from year to year, it should not only state the day upon which the tenant is required to quit, but it should also specify the cause for which the tenancy, whether it be for a designated term, or is of uncertain duration, is intended to be thus terminated.[2]

§ **633. Time Mentioned in General Terms.**— Nevertheless, it is by no means essential that the notice should mention the precise day on which the tenancy is to expire, but if otherwise stated correctly, the time may be mentioned in general terms. Therefore a notice to quit at the end of the month or quarter, as the case may be, which will expire next subsequent to the day when the rent shall again become due, without specifying the exact day of the month, would be sufficient to terminate a tenancy at will, for the reason that it designates with sufficient certainty a day equally within the knowledge of both tenant and landlord.[3]

§ **634. Tenant from Week to Week.**— So where a tenant from week to week receives notice to quit the premises oc-

[1] Steward *v.* Harding, 2 Gray, 335; Oakes *v.* Munroe, 8 Cush., 282; Boynton *v.* Bodwell, 113 Mass., 531.

[2] Currier *v.* Baker, 2 Gray, 224.

[3] Sanford *v.* Harvey, 11 Cush., 93; Granger *v.* Brown, id., 191; Kemp *v.* Derrett, 3 Camp., 510.

cupied by him as such tenant, on a subsequent Friday, provided his tenancy expired on that day, otherwise at the end of his tenancy next after one week from the date of the notice, this was held sufficiently specific in its terms to entitle the landlord to possession at the expiration of the time therein indicated.[1]

§ 635. Must Not Demand Possession "Forthwith."— But where the statutory notice was required to be given fourteen days prior to the time of quitting, a notice which was given the full time prescribed before the bringing of an action by the landlord for possession, but which in terms demanded the vacation of the premises "forthwith," was held insufficient, as not designating the time when the landlord would be entitled to possession after notice.[2]

§ 636. Undue Strictness Not Required.— Where the notice is executed by an agent, or any one acting in a representative capacity, it is not necessary, in order to entitle such notice to recognition by the party notified, that it should possess all the formal requisites, as to execution, etc., deemed essential in case of a letter of attorney; but it will be regarded as sufficient in this respect if it informs him as to the source from which the notice proceeds. Thus, where the landlord was one C. M. H., and the notice to quit was signed, "For C. M. H., by W. C. P., an authorized agent," it was held to be formally sufficient.[3]

§ 637. Description.— The notice should also be sufficiently specific in the description of the subject of demise, not to mislead the other party, nor leave him in any doubt as to what property is intended to be designated.[4] And where the notice is substantially defective in this particular, it will, for obvious reasons, be altogether nugatory, however precise and exact it may be in its conformity to legal requirements, in all other respects. Where there are sev-

[1] Doe *v.* Scott, 6 Bing., 362.
[2] Elliott *v.* Stone, 12 Cush., 174.
[3] Reed *v.* Hawley, 45 Ill., 40.
[4] King *v.* Conolly, 44 Cal., 236.

eral different places occupied by the same tenant, under the same landlord, the law will not be satisfied by the giving of a notice, either by landlord or tenant, which is so general in its description of the premises as to apply equally well to either.

§ 638. **Substantial Accuracy Alone Required.**— Nevertheless, in this particular, as in all others regarding notices of this sort, what the law requires is substantial, and not technical, accuracy, and will not regard mistakes in the description which do not tend to mislead the party notified. Thus, where the language of the notice was to quit that "messuage, farm, etc., situated at D., in the county of York, which you now hold under me, as tenant from year to year," and it appeared on the trial that the farm intended, and the only one occupied by the tenant, was not situated at D., but at H., and that D. and H. were adjoining parishes, the variance was held immaterial, as not calculated to mislead the tenant.[1]

§ 639. **Illustration of Sufficient Certainty.**— Where, according to the terms of a lease for a term of years, either party was at liberty to terminate the same at the expiration of the fourteenth year, and there were several different tracts held under the same lease, and notice to quit was given, describing only a part of the property included in the lease, but adding the words, "agreebly to the terms of the covenant between us, on the expiration of the fourteenth year of our term," this was held to indicate with sufficient certainty that it was intended to apply to all, for the reason that the covenants referred to did authorize a termination of the lease as to part, and a continuation of the term as to the rest.[2]

§ 640. **Service of Notice.**— There is not a great deal to be said as to the manner and mode of serving notices of this kind, beyond what is repeatedly laid down in other portions of this work with respect to the service of notices, by

[1] Doe *v.* Wilkinson, 12 Ad. & El., 743.

[2] Doe *v.* Archer, 14 East, 245.

which the rights of the party notified are affected. Any manner of serving the written notice will suffice, when it can be traced to the hands of the party for whom it was intended, in due time. Personal notice is always best, because it is more direct, and when service upon the party in person is practicable, it should be the mode adopted. But were there no other way of bringing these tenancies to an end, short of notice delivered to the landlord or tenant in person, they might be rendered of indefinite duration, by the avoidance of notice on the part of the party whose interests dictated such a course. For this reason the doctrine has long since been recognized, that, even in the absence of a statute for that purpose, notice to quit may be effectually served upon the tenant during his absence, by leaving the same at his usual place of abode, whether it be upon the leased premises or not, with his wife or other suitable member of the family, or even with a servant.[1] And where the party has a place of business, he may be effectually notified by leaving the written notice at such place, with some one in charge.[2]

§ **641. May be Waived.**— This, like almost every other species of notice, required by law for the preservation of a right, or the exaction of a duty, may be waived. It, however, possesses one peculiarity in this respect not common to all other kinds of notice, and that is, that the waiver may be either before the notice is given, after the time for giving it has elapsed, or subsequent to the giving of the notice, when it has been given in due time. It may be waived by either party before it is due or after failure to give notice, by acting in conformity to the wishes of the other party in amicably terminating the tenancy precisely as though notice had been given. It may also be substantially waived by acting upon a defective notice. And there may be a waiver of notice by the party giving it, when he subsequently acts toward the other party precisely as though no such notice had been given.

[1] Jones *v.* Marsh, 4 T. R., 464; Clark *v.* Keliher, 107 Mass., 406.
[2] Walker *v.* Sharpe, 103 Mass., 154.

§ 642. **Voluntary Surrender.**— Where there has been a voluntary surrender of the premises by the tenant, and an acceptance thereof by the landlord, the necessity for notice to quit is thereby dispensed with, and either party would be justified in treating the tenancy as at an end from the time of such surrender and acceptance. The transaction possesses all the essential characteristics of any executed contract, and for that reason it would be equally effectual as a waiver of notice whether it were verbal or written.[1]

§ 643. **Parol Surrender and Acceptance.**— So where premises were thus surrendered and accepted, though by parol, and no claim for rent was made for seven years thereafter, and the premises were relet to others, the surrender was treated as an accomplished fact, and not to be affected by the statute of frauds.[2] And a surrender of this kind, and the acceptance by the landlord, may be proven by the circumstance that the landlord relet the premises during the term for which the tenant would have been held but for the surrender.[3]

§ 644. **Offering to Let Not Waiver.**— But where the tenant is absent for a time, or even without the intention of returning at all, and during such absence the landlord offers the place to let by putting up placards on the premises, or by what means soever he may choose to adopt, whether public or private, unless the place is actually rented, the landlord will not be held to have accepted the surrender, and thereby waived his right to notice.[4]

§ 645. **Parol Surrender Must Go Into Immediate Effect.**— In order that a parol surrender may be effectual, it must go into effect at the time the same is offered. It will not be sufficient to terminate a tenancy from year to year when there is merely a verbal offer to surrender prior to the time when it is proposed to give up the premises, which offer is accepted in the same manner, where the statute of

[1] Whitehead *v.* Clifford, 5 Taunt., 518; Williams *v.* Jones, 1 Bush (Ky.), 621.

[2] Pratt *v.* Richards, 69 Pa. St., 53.

[3] Witman *v.* Watry, 31 Wis., 638.

[4] Pier *v.* Carr, 69 Pa. St., 326; Redpath *v.* Roberts, 3 Esp., 225.

frauds is recognized.[1] It is provided by this statute that "no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements or hereditaments shall be surrendered, unless by deed or note in writing, or by act and operation of law." Therefore parol notice less than six months before the day on which the tenant is to quit, that he will on that day vacate the premises, to which the landlord assents, being insufficient as a notice on account of shortness of the time, is void as a surrender, for the reason that it is to take effect *in futuro*, and is not reduced to writing.[2]

§ 646. Verbal License to Surrender Tenancy from Year to Year Inoperative.— So where a dispute arose between a tenant from year to year and his landlord concerning repairs, and the tenant threatened to quit the premises, to which the landlord replied, "You may quit when you please!" and the tenant accordingly, a few days thereafter, left the premises, it was held that this did not terminate the tenancy, and the tenant would still be liable for rent.[3]

§ 647. Defects in Notice May be Waived.— The defects in a notice which is insufficient for the reason that it designates no time, either specially or in general terms, may be waived, so as to give it all the force and effect of a regular and perfect notice. Thus where such defective notice was given by the tenant to the landlord, and the latter, after receiving the notice, in order to induce the tenant to remain, offered to lower the rent and make certain repairs, these facts were held admissible in evidence to prove the landlord's waiver of the omissions from the notice.[4]

§ 648. Waiver of Rights Under Notice.— When notice has been given by either the landlord or the tenant, whether the time for which such notice is given has expired or not, the waiver by the party giving the notice would properly

[1] 29 Car. II., c. 3, § 3.

[2] Johnstone *v.* Huddlestone, 4 B. & C., 922; Doe *v.* Milward, 3 Mees. & Wels., 328.

[3] Mollett *v.* Brayne, 2 Camp., 103.

[4] Boynton *v.* Bodwell, 113 Mass., 531.

be styled a waiver of his rights under the same, rather than a waiver of notice, as it is generally termed. This right may be waived by either party so as to perpetuate the tenancy. If the landlord receive rent after the date when the tenant is notified to quit, or after giving such notice in advance for a time subsequent to the designated time of quitting, this will operate conclusively upon him to prevent the enforcement of his rights to immediate possession.[1] Upon the same principle, the landlord's distraining for rent, accrued after the expiration of his notice to quit, will amount to a waiver.[2]

§ 649. Will Not be Presumed from Acceptance of Rent by Unauthorized Person.— But where the tenancy is regularly terminated by notice to quit, and the tenant wilfully holds over without the permission of the landlord, express or implied, such holding over will not prolong the tenancy.[3] And though such permission may be implied from a receipt of rent after such notice, where the rent was paid to one who was not authorized to receive it, such payment would not affect the rights of the landlord, although such person had previously been accustomed to receive rents for the landlord.[4] Nor would the giving of a second notice to quit, after the expiration of the time limited in the first, amount to a waiver of the party's rights under the notice.[5]

§ 650. Mere Permission to Remain After Notice No Waiver.— Mere permission of the landlord for the tenant to remain for a time after notice will not in every instance amount to a waiver. Thus where, after notice, the landlord promised the tenant that he need not remove, unless the premises were sold, and accordingly permitted him to remain until such sale, it was held that the notice was not thereby waived.[6]

[1] Collins *v.* Canty, 6 Cush., 415; Prindle *v.* Anderson, 19 Wend., 391; Goodright *v.* Cordwent, 6 T. R., 219.

[2] Zouch *v.* Willingale, 1 H. Blackst., 311.

[3] Boggs *v.* Black, 1 Bin., 333.

[4] Doe *v.* Calvert, 2 Camp., 387.

[5] Messenger *v.* Armstrong, 1 T. R., 43.

[6] Whiteacre *v.* Symonds, 10 East, 13.

CHAPTER IX.

PRINCIPAL AND AGENT.

I. Notice of Agency.
II. Notice to an Agent.
III. Notice by an Agent.

I. Notice of Agency.

§ 651. Principal's Liability, When Agent Exceeds Authority.
652. Secret Instructions Will Not Limit.
653. Limited by Written Authority.
654. Principal Bound by Agent's Representation.
655. Notice of Limitation Should be Prior to the Transaction.
656. Principal Bound by Agent's Acts in Excess of Authority by Letter of Attorney.
657. Persons Dealing with Agent Must Take Notice of Contents of Letter of Attorney.
658. Public and Private Restriction of Authority.
659. Agent's Authority Limited by Law.
660. When Parties Bound to Inquire.
661. Illustration Where Authority in Writing.
662. Illustration Where Authority by Parol.
663. Difference Between General and Special Agents.
664. Transactions Requiring Scrutiny of Agent's Authority.
665. Avoidance of Knowledge of Limitation of Agent's Authority.
666. Agent to Negotiate Bills and Notes.
667. Subsequent Ratification.
668. Ratification with Notice Binds Principal.
669. Silent Acquiescence Will Release Agent.
670. Contract in Name of Agent Binding.
671. Principal Bound Though Agency Concealed or Revoked Without Notice — Husband and Wife.
671*a*. Ratification of Acts After Authority Revoked.

§ 651. Principal's Liability, When Agent Exceeds Authority.— The full measure of the principal's liability for the acts of the agent is not declared in the rule as generally laid down — that the principal is liable for the acts of his

agent, done within the scope of his authority. One dealing with an agent is not always fully informed of the extent of such agent's authority, and when his want of knowledge is not the result of laches, or voluntary ignorance, the principal may be bound, though the agent exceeds his authority. When the *apparent* authority with which the agent is clothed is greater than was intended by the principal, the liability of the latter for unauthorized acts of the former arises from the application of the familiar principle, that where one of two innocent parties must suffer by the misconduct of another, it should be the one who has placed it within the power of the other to perpetrate the wrong.[1]

§ 652. Secret Instructions Will Not Limit.— A person dealing with an agent who is apparently clothed with general powers in connection with the subject-matter of the transaction is not required to take notice of private or secret instructions, limiting the powers of such agent, nor is he put upon inquiry in regard to such instructions, so long as the transactions are within the general scope of the agent's ostensible powers.[2] Accordingly, when the authority of an agent, authorized to sell goods on commission, was restricted to sales for cash, of which restriction a common carrier had no express notice, and the agent exceeded his authority by selling on credit, the carrier was not, as a matter of law, put on inquiry by the initials "C. O. D." marked on the package delivered to the customer, and was hence not liable to the principal for failure to collect, unless, in the opinion of the jury, the marks on the package amounted to notice. The carrier had the written order of the agent to deliver the goods, and had notice of the agent's authority to sell, and whether he was sufficiently notified of the restriction upon this authority was a question of fact for the jury.[3]

[1] Ramsey *v.* Strobach, 52 Ala., 513; Calais Steamboat Co. *v.* Van Pelt, 2 Black, 372; 2 Kent's Comm., 620–21; Story on Agency, § 127.

[2] Andrews *v.* Kneeland, 6 Cow., 354; Beals *v.* Allen, 18 Johns., 363; Pickering *v.* Busk, 15 East, 38.

[3] Daylight Burner Co. *v.* Odlin, 51 N. H., 56; 12 Am. R., 45.

§ 653. **Limited by Written Authority.**—When notice of the authority conferred upon an agent is communicated by a letter of attorney, letter of credit, or other writing, the course to be pursued by persons dealing with such agent is quite clear. The full extent of the power conferred may be looked for in the written instrument. By it, the agent's authority will be expressly defined. When, however, the principal has not thus expressly defined the limits of the power conferred upon his representative, the extent of his authority may be inferred from the acts of both principal and agent.[1] As where goods were bought of a broker to whose name they had been transferred, the purchaser would not be affected by secret instructions from the principal. Putting the goods in the hands of one whose business it was to sell, amounted to an implied authority to sell them.[2] So where the equitable owners of a vessel permitted her to be held in the name of another as legal owner, for the purpose of making a sale, a purchaser might infer from such conduct, even where he had notice of the character in which the legal owner held, that he had unlimited authority to dispose of the vessel. Such purchaser could not be affected by any concealed interest, or secret instructions from the principal, of which he had no notice. And such notice, it was held, to affect him, should be established by unequivocal proof, where the fact had been studiously secreted down to the time of sale.[3] So also in an action of *assumpsit*, on a warranty by a servant empowered to sell a horse, the defendant denied the authority of the servant to make the warranty. It was held by Lord Ellenborough, however, that as the horse was intrusted to the servant's care for the express purpose of selling it, the inference would follow

[1] Perkins *v.* Wash. Ins. Co., 4 Cowen, 645; Com. Bank Lake Erie *v.* Norton, 1 Hill, 501.

[2] Pickering *v.* Busk, 15 East, 38; Whitehead *v.* Tuckett, id., 400: Everett *v.* Saltus, 15 Wend., 474; Dyer *v.* Pearson, 3 Barn. & Cres., 38; Sanford *v.* Handy, 23 Wend., 260.

[3] Calais Steamboat Co. *v.* Van Pelt, 2 Black, 372.

that he was authorized to do whatever was necessary to effect the sale.[1] So where an agent was employed to obtain subscriptions to the capital of a joint stock company, his principal was held liable for his false representations, because to make representations was within the scope of his authority, and was what should have been expected from one employed in that capacity.[2]

§ 654. Principal Bound by Agent's Representation.— Where representations are made by an agent, to which it is sought to hold the principal, the privity of the principal may be presumed from the character of such representations, and the notoriety with which they are made. As where the agent of ship-owners advertised the sailing of a vessel, and in the public advertisement made representations as to convoy, etc., it was held to render the owners privy to the representations made, and consequently bound by them.[3]

§ 655. Notice of Limitation Should be Prior to the Transaction.— Notice of the agency, and of its special character, must come to the person dealing with the agent *before* the transaction, in order to affect such person. As where one borrowed the principal's money of the agent for a stipulated time, it was decided that he could hold it as against the principal, notwithstanding subsequent notice of the agency, and that in loaning the money the agent exceeded his authority.[4]

§ 656. Principal Bound by Agent's Acts in Excess of Authority by Letter of Attorney.— Even when the authority of the agent is expressly limited in the written instrument to which persons dealing with him are bound to look in order to learn that he has any power whatever to

[1] Helgear *v.* Hawke, 5 Esp., 72.

[2] Sandford *v.* Handy, 23 Wend., 260.

[3] Runquist *v.* Ditchell, 3 Esp., 64; Hunter *v.* Hudson, etc., Co., 20 Barb., 493; National Ech. Co. *v.* Drew, 32 Eng. L. & Eq., 1. It has been held however, that the principal will not be held where he did not direct the representations to be made. Fuller *v.* Wilson, 3 Ad. & Ell., N. S., 629.

[4] Lime Rock Bank *v.* Plimpton, 17 Pick., 159.

bind his principal, he may overstep the limits of his authority, and bind his principal. As where an agent had been sent from England to Peru, with a written power of attorney to purchase, lease, work, etc., mining claims and mines for his principal, with also a general letter of credit authorizing him to draw upon the principal to the extent of £10,000. After drawing the amount authorized by his letter, he gave plaintiff a draft for £1,500 additional, and it was held that the plaintiff might infer from the power of attorney that the agent was clothed with necessary authority to carry out the extensive enterprises therein mentioned, and even if plaintiff had seen the letter of credit, as the amount already drawn was not indorsed thereon, it would not have amounted to notice to him that defendant's agent had exceeded the limits of his authority.[1] So it was held in another case,[2] that the conduct and admissions of the agent as to his own interpretation of the authority conferred upon him would justify a person dealing with him in entering into contracts which they both *knew* to be beyond the letter of the agent's instructions. The authority of this case may well be questioned. The agent had written authority from his principal to purchase grain at a fixed price. The written authority was communicated to the seller of the grain, who said "There must be some mistake," and sold the grain to the agent on account of his principal, at a price in advance of that which the agent was by his written instructions authorized to contract for. In an action to recover the purchase price, the agent, being called as a witness, testified on cross-examination that *he considered himself authorized to pay a higher price than that mentioned in his written instructions*, whereupon the court declared that the agent "*admits* he did not consider himself as bound by the direction in writing of his principal; he considered himself at liberty to exceed that authority." Therefore, it was held, his principal was bound. Here the agent who had exceeded his au-

[1] Withington *v.* Herring, 5 Bing., 442.

[2] Hicks *v.* Hankin, 4 Esp., 114.

thority in order to justify his conduct on the ground of good intentions is allowed to *admit* away his principal's defense.

§ 657. Persons Dealing with Agent Must Take Notice of Contents of Letter of Attorney.— The correct rule is, that when an agent is known to be acting under written instructions, those having dealings with him should look to the instrument by which his powers are conferred, to gain a knowledge of the extent of those powers, and where they neglect to examine his written authorization, they are none the less charged with notice of the limitations and restrictions therein contained, either in express language or by necessary implication.[1] A party dealing with an agent whose authority is conferred by a written instrument is bound to take notice of its legal effect.[2] It was accordingly held as the general words in a power of attorney would not enlarge the scope of the powers therein conferred, beyond what was indicated in the preceding language, that notice must be taken of the particular words by which such powers were restricted.[3]

§ 658. Public and Private Restriction of Authority.— When the limitation on the authority of a general agent is public, every one must regard it. But if it be private, it must be brought directly to the notice of any one dealing with him in that capacity; otherwise the principal will be bound by transactions beyond the limits of the agency.[4]

§ 659. Agent's Authority Limited by Law.— Where the limitations upon an agent's authority are fixed by law, every one is bound to notice them. As in case of a guardian or curator of an infant, who is dealing with his ward's estate, any one who is a party to such a transaction, with notice that the subject-matter of their dealings is the property of

[1] Stainback *v.* Bank of Virginia, 11 Gratt., 269; Leverich *v.* Mayor of New York, 66 Barb., 623.

[2] Rossiter *v.* Rossiter, 8 Wend., 494.

[3] See Campbell *v.* Hastings, 29 Ark., 512.

[4] Bryant *v.* Moore, 26 Me., 84; Johnson *v.* Jones, 4 Barb., 369.

the ward, is charged with notice of the statutory limitations upon the power of the guardian, and acts at his peril.[1]

§ 660. **When Parties Bound to Inquire.**— When the agent acts under a special authority, whether written or verbal, those dealing with him, with notice of the nature and character of such agency, are bound to inquire into the extent of the power conferred upon such agent.[2]

§ 661. **Illustration Where Authority in Writing.**— The above doctrine, as applied to agents acting under written authority, is fairly illustrated by the case of Schimmelpenich *v.* Bayard.[3] There the principal, who was plaintiff in the action, resided abroad, and appointed an agent in this country, with authority to purchase certain commodities on account of the principal, and, for the purpose of facilitating the business, requested defendant to indorse drafts drawn by such agent on the principal, to an amount expressly limited in the letter of credit, for the purpose of making such purchases. In the correspondence between plaintiff and defendant the former warned the latter not to advance any money to the agent, except there was a "moral certainty" that he was using it in the interest of his principal. Plaintiff had also advised defendant to take the agent's bills "in the persuasion of their solidity, and of the reality of the transactions on which they were issued." Though the principal continued to receive consignments, and honor drafts somewhat in excess of the amount limited in the letter of credit, and in his correspondence with defendant expressed confidence in the integrity of the agent, he was held not to be bound by excessive drafts drawn by the agent to obtain money for his own, instead of the principal's, use.

[1] Woods *v.* Boots, 60 Mo., 546.

[2] Snow *v.* Perry, 9 Pick., 542; Dunning *v.* Smith, 3 Johns. Ch., 344; Hatch *v.* Taylor, 10 N. H., 547; Towle *v.* Leavitt, 23 N. H., 36; Schimmelpenich *v.* Bayard, 1 Pet., 264; Gibson *v.* Colt, 7 Johns., 390; Stainor *v.* Tyson, 3 Hill (N. Y.), 279; North River Bank *v.* Aymar, id., 262; Molony *v.* Kernon, 2 Dr. & War., 40; Kerr *v.* Lord Dungannon, 1 Dr. & War., 509; Att'y Gen. *v.* Pargeter, 6 Beav., 150.

[3] 1 Pet., 264.

§ 662. **Illustration Where Authority by Parol.**—The case of Towle *v.* Leavitt[1] is an example of the operation of this rule in cases where the authority conferred upon the agent is not reduced to writing. Here, the principal intrusted a phaeton to the care of one whose general business was to make and sell, as well as to repair, carriages, etc., with power to sell the phaeton, but for not less than $40. At the close of a sale of some of his own property, under an attachment, the agent offered the phaeton at auction, and it was purchased for $17. It was held that the unusual manner of the sale, together with the fact that it was a second-hand vehicle, such as it was not the business of the agent to sell, were sufficient to inform the purchaser of the special character of the agency, and put him upon inquiry as to the extent of the agency; and that, as such inquiry would have led to the knowledge that the agent was not authorized to sell at auction, or for a less sum than *forty dollars*, the principal might reclaim his property. So in the case of Gibson *v.* Colt,[2] it was decided that a power to sell was a special power, so far as concerned any transactions or contracts beyond the mere selling. That it did not include power to *warrant*. In this case the master of a vessel was authorized to sell in the same manner as the owners might sell, and, upon offering the vessel to the purchasers, made false representations as to her registry, and the court held that the owners were not bound by such representations, as the purchaser was charged with notice of the powers with which the agent was clothed, and that such representations were in excess of such powers. There is an apparent conflict between this case and that of Helyear *v.* Hawke,[3] which

[1] 23 N. H., 36.

[2] 7 Johns., 390. See, also, Edwards *v.* Thomas, 2 Mo. App., 282; Clerks' Sav. Bank *v.* Thomas, id., 367, where it was held that the indorser of negotiable paper, indorsed by an agent, for the benefit of one other than his principal, knowing it to be accommodation paper, was put upon inquiry as to the authority of the agent to bind his principal by the indorsement.

[3] 5 Esp., 72. See, also, Bronson *v.* Coffin, 118 Mass., 156; Wicks *v.* Hatch, 62 N. Y., 535.

can only be reconciled, if at all, upon the ground that in the English case selling was the business in which the owners were engaged, and the agency was *general* for that purpose, while in the American case the selling of the vessel was a departure from the general business of both owner and master, and hence the agency for that purpose was strictly special.

§ 663. Difference Between General and Special Agents. To determine the extent to which purchasers from agents are charged with notice of limitations upon their powers, it is necessary to keep constantly in view the distinction between those who act under general authority and those clothed by the principal with special powers. In dealing with one of the former, the principal is bound by everything done within the general scope of his authority, until the person dealing with him has been notified of a revocation of his authority; while, where the agent is exercising powers specially conferred, every act is void, so far as it affects the principal, which is not in strict conformity with his instructions.[1]

§ 664. Transactions Requiring Scrutiny of Agent's Authority.— Where the agent professes to act under and by virtue of authority specially conferred, the duty of the person dealing with him is quite plain so far as concerns inquiry into the extent of such special authority. But controversies quite frequently arise from a misconception of this matter, by the agent, the person dealing with him, or by the principal. The two former are liable to be misled by the *general language* of a letter of attorney, given for a *special purpose*.[2] The latter may incur liability by *apparently* investing his representative with larger powers than he really intended.[3] There are, however, certain transactions which, by their very nature, should excite caution upon

[1] Allen *v.* Ogden, 1 Wash. C. Ct., 174; Munn *v.* Commission Co., 15 Johns., 44; Nixon *v.* Palmer, 8 N. Y., 398.

[2] See *supra*, § 657.

[3] See *supra*, § 656.

the part of one dealing with an agent, and lead to careful scrutiny and inquiry. Such, for example, is the *acceptance of bills*, and the *execution of promissory notes*, by one as the agent of another. Here the agency is apparent on the face of the transaction, and as these are powers which are exercised almost invariably under special authority, it behooves the holder of the note, or the party accepting the bill, to look well to the extent of the agent's powers.[1] In the case cited the agent acted under two letters of attorney, by one of which he was authorized to do certain acts, among others to indorse bills for and in the name and to the use of his principal. This it was held only authorized acts for the defendant's sole use, and not for a copartnership of which he was a member. And though there were general words in the instrument, as the power to accept bills was not included among those enumerated, it could not have been intended. The other letter gave express authority to accept for the defendant, and on his behalf, bills drawn by his agents. This was held not to include partnership paper drawn by one of his partners. This was the legal construction put upon these powers of attorney, and so they should have been taken notice of by the plaintiff.[2]

§ 665. Avoidance of Knowledge of Limitation of Agent's Authority.— One dealing in good faith with an agent, upon the strength of his apparent authority, and where the matter seems within the general scope of the powers usually conferred upon such agents, may be excused from that close scrutiny into the nature and extent of the agent's authority that would be required at the hands of one who manifestly sought an unfair advantage. As where a shipper of goods had received a proportion from the owners of a vessel for the carrying of certain articles of merchandise at certain rates. The shipper had a personal interview with the owners and endeavored to obtain a contract for the

[1] Atwood *v.* Munning, 7 Barn. & Cres., 278. See, also, Spooner *v.* Thompson, 48 Vt., 259.

[2] See *supra*, § 657.

transportation of the goods at reduced rates, but failed in obtaining the concession. Subsequently he saw their agent, and, concealing the fact of his interview with the principals, obtained a written contract from him upon more favorable terms than the owners would agree to. The vessel was accordingly laden, and the captain, supposing the contract to be binding, signed bills of lading in conformity therewith. It was held that as the shipper had reason to know that the agent's authority was limited, he would be charged with notice of that fact, and consequently the owners were not bound by the action of either of their agents who exceeded their authority, and could command the regular and customary price for the carriage.[1]

§ 666. **Agent to Negotiate Bills and Notes.**— An agent who is intrusted with the disposal of negotiable instruments is usually, to all appearance, the regular holder. And when he disposes of such paper by sale, pledge or otherwise, contrary to the orders of his principal, to a *bona fide* purchaser without notice, the principal will be bound by the transaction, though the holder took them without any inquiry at all; "for it is said that the title of the holder, in case of negotiable instruments, is derived from the instrument itself, and not from the title which the party has from whom he received them."[2]

§ 667. **Subsequent Ratification.**— Even where the relation of principal and agent does not exist, either in fact or appearance, at the time of the contract, under certain circumstances, the obligation may be rendered binding upon the principal by subsequent ratification; but here the law of notice comes into operation as affecting the principal. For the ratification of the acts of one falsely assuming to act as the agent of another, in order to be effectual, must be with a full knowledge of the circumstances.[3]

[1] Barnard *v.* Wheeler, 24 Me., 412.

[2] Bay *v.* Coddington, 5 Johns. Ch., 54; S. C., 20 Johns., 637; Story on Agency, § 228.

[3] Nixon *v.* Palmer, 8 N. Y., 398.

§ 668. **Ratification with Notice Binds Principal.**— But where the principal has been duly notified of the acts of his pretended agent, he may, not only by express approval, but by his conduct in accepting the benefits to be derived from the transaction, or by protracted silent acquiescence, estop himself from evading its attendant liabilities; for it is the duty of such an involuntary party to a contract, as soon as he is notified thereof, to signify his disapproval without unnecessary delay by giving notice to the other party.[1] And if the transaction which he proposes to repudiate consists of a purchase of goods in his behalf, he should return the goods, and this notice of disapproval, and restitution should take place with equal promptness, whether he seeks to deny the agency itself, or only claims that the agent has exceeded his authority.[2]

§ 669. **Silent Acquiescence Will Release Agent.**— It is also held in the case last cited that the silent acquiescence of the principal after notice will release the agent from liability for disobeying instructions. So, where an action was brought against a naval commander, for his acts in a public capacity, in excess of the authority conferred by his instructions, it was held that the approval of his government, after due notice of the circumstances, rendered it the act of government, and the public agent could not be held civilly liable to one injured by such acts.[3] But the mere fact of ratification of a single transaction as purchasing agent will not justify persons in giving him credit as such, fifteen months afterwards, when he pretends to be acting for the same principal.[4]

§ 670. **Contract in Name of Agent Binding.**— Where one has dealings with an agent, knowing him to be acting

[1] Summerville *v.* Hannibal & St. J. R. R. Co., 62 Mo., 391; Home Life Ins. Co. *v.* Pierce, 75 Ill., 426; Henderhen *v.* Cook, 66 Barb., 21.

[2] Johnson *v.* Jones, 4 Barb., 369; Bray *v.* Gunn, 53 Ga., 144.

[3] Buron *v.* Denman, 2 Exch., 167.

[4] Cupples *v.* Whelan, 61 Mo., 583. See, also, Everett *v.* Saltus, 15 Wend., 474.

in that capacity, the contract entered into between them will not only bind the principal, but will bind the other party to the principal, though the transaction is in the name of the agent.[1] In this case a marine policy of insurance was taken out in the name of the agent, with notice to the insurer that it was for the principal's benefit, and the company was not allowed to reduce the amount of the claim for loss by set-off of a debt against the agent personally; though the premium note given by the agent in his own name was deducted as being the debt of the principal.

§ 671. Principal Bound Though Agency Concealed, or Revoked Without Notice — Husband and Wife. — A contract made by an agent for his principal may bind the principal though at the time the other contracting party may have no notice of the agency, and believe the agent to be the real party with whom he is contracting;[2] though in case of a concealed agency, a subsequent disclosure does not deprive the other party of his right of action against the agent, who concealed the name of his principal. An action may be maintained against the principal because he received the benefit of the contract, and against the agent because it was to him the credit was given, on his own representations; but there can only be one satisfaction.[3] And where a previously subsisting agency has been revoked without notice to the party accustomed to have dealings with the principal through such agent, the liability of the principal will attach to all transactions in the name of the principal, within the apparent scope of the agent's authority until notice of revocation.[4] The principal's estate has also been held when such agency was revoked by his own death, and the transactions occurred in good faith before

[1] Hulbert *v.* Pacific Insurance Co., 2 Sumn., 471.

[2] Ingelhart *v.* Thousand Island Hotel Co., 14 N. Y. Sup. Ct., 547.

[3] Beymer *v.* Bonsall, 79 Pa. St., 298.

[4] Clafflin *v.* Lenheim, 66 N. Y., 301; McNeilly *v.* Continental Life Ins. Co., id., 23; Spencer *v.* Wilson, 4 Munf., 130; Morgan *v.* Stell, 5 Binn., 305; Beard *v.* Kirk, 11 N. H., 397.

notice of such death either to the agent or the other party.[1] But under a similar state of facts, such transactions were held void though made in good faith and in ignorance of the principal's death.[2] The doctrine of agency has been applied to the relation of husband and wife, in order to account for the former's liability for the latter's contracts, and hence the acts which amount to a revocation of such agency, and what is notice of such revocation to those giving her credit. The learning heretofore laboriously expended in that direction has seemed to involve itself in such inconsistencies, that it may now well be doubted whether the husband's liability for the debts contracted by his wife rests upon the doctrine of implied agency. Where it is so held, however, such agency is considered as revoked by the wife's abandonment of her husband's bed and board, especially where she is living in adultery with another, and her notoriously living apart is regarded as notice of the revocation of the agency.[3] But, on the other hand, if he puts her away, or her desertion of him is because of his adultery, he still remains liable as before, notwithstanding the fact that he gives express notice to those who supply her wants, not to give her credit on his account.[4]

§ 671a. Ratification of Acts After Authority Revoked. As already stated, there are circumstances under which the principal will be held liable for the acts of his agent in excess of his authority conferred by letters of attorney.[5] But persons dealing with an agent so authorized must take notice of the contents of the instrument by which the power is conferred,[6] and when such powers are exceeded

[1] Cassiday *v.* McKenzie, 4 W. & S., 282; Smout *v.* Ilbery, 10 M. & W., 1; Watson *v.* King, 4 Camp., 272.

[2] Rigs *v.* Cage, 2 Humph. (Tenn.), 350.

[3] Brown *v.* Patton, 3 Humph. (Tenn.), 135; Baker *v.* Barney, 8 Johns., 72; Robison *v.* Goswold, 6 Mod., 171; Caney *v.* Patton, 2 Ashm. (Penn.), 140; Hunter *v.* Boucher, 3 Pick., 289: Morris *v.* Martin, 1 Str., 647; Manwairing *v.* Sands, id., 706; McCutchen *v.* McGahay, 11 Johns., 281.

[4] Sykes *v.* Halstead, 1 Sandf., 483; Etherington *v.* Parrot, 1 Salk., 118.

[5] *Supra*, § 656.

[6] *Supra*, § 657.

the principal will not be bound unless he subsequently ratifies the acts of his agent, with notice of the excess of authority.[1] Examples are given in the sections cited of ratification by which the principal will be bound. But when the principal authorized his clerk to draw checks against the former's bank account, and such authority was conferred by power of attorney in which the period for which the clerk was empowered to act was limited to fifteen days, it was held that the principal could not be bound by checks drawn by the agent after that time, notwithstanding the fact that the bank-book was written up several times in the mean time, without the principal's knowledge — the book being in the hands of the clerk.[2] But where an agent exceeded his authority by procuring a promissory note for his principal for which he receipted in the principal's name, agreeing that the note should be taken care of at maturity, all of which was unauthorized, the principal was held to have ratified the contract, by using the note in his business.[3]

[1] *Supra*, §§ 667, 668, 669.

[2] Manufacturers' Nat. Bank *v.* Barnes, 65 Ill., 69; 16 Am. Rep., 576.

[3] Mundorff *v.* Wickersham, 63 Pa. St., 87; 3 Am. Rep., 531.

II. Notice to an Agent.

§ 672. Notice to Agent is Notice to Principal.
673. General Application of the Rule.
673*a*. The Effect Where Actual Notice Essential.
674. Effect of Notice Depends Upon Nature of Agency.
675. Executive Officer of a Bank.
676. Notice to Trustees.
677. Bound by Agent's Unlawful Acts.
678. Person Misled by Acts of Principal.
679. Wife Affected with Husband's Knowledge.
680. Confined to Transactions in Which He is Active.
681. Notice to One of Several Agents Sufficient.
682. Director of a Bank.
683. Corporation Not Affected with Every Fact Known to Directors.
683*a*. Notice to Directors of Corporation.
683*b*. Notice to Corporations Through Their Executive Officers.
684. Joint Purchasers Not Principal and Agent.
685. The Same Kind of Notice to Principal as to Agent.
686. To Agent of Agent Not Sufficient.
687. Place, Manner and Time of Acquiring Knowledge.
688. Same — When to be Considered.
689. Knowledge Acquired During Agency.
690. Agent's Duty to Communicate.
691. Where Agent's Authority Depends Upon Ratification.
692. Notice to Attorneys — Breach of Confidence to Disclose.
693. Executor and Administrator.
694. Knowledge of Trustee Before Creation of the Trust.
695. Notice of Torts of Agents and Servants.

§ 672. Notice to Agent is Notice to Principal.— The rule of law that charges the principal with notice of every fact coming to the knowledge of his agent, which is connected with the business in which the agent is employed, may be tersely expressed thus: *Notice to an agent is notice to the principal.*[1] It is generally regarded as *constructive* notice to the principal; but it is at least doubtful whether

[1] Astor *v.* Wells, 4 Wheat., 466; Bracken *v.* Miller, 4 W. & S., 102; Reed's Appeal, 34 Pa. St., 207; Mechanics' Bank *v.* Seton, 1 Pet., 309; Jackson *v.* Sharp, 9 Johns., 162; Jackson *v.* Winslow, 9 Cow., 13; Jackson *v.* Leek, 19 Wend., 339; Bank of U. S. *v.* Davis, 2 Hill, 451; Fuller *v.* Bennett, 2 Hare, 402; Sheldon *v.* Cox, 2 Eden, 224; Sterling Bridge Co, *v.* Baker, 75 Ill., 139.

this is a correct use of the word "constructive," as applied to the law of notice.[1] To employ it in this connection is only to introduce confusion in legal terminology, by giving to a word a peculiar signification, where it has quite a different one when applied to other branches of the same subject. To qualify in this manner the notice which is given through an agent would be to cut off entirely from the possibility of notice a large class of purchasers in cases requiring *actual* notice. Corporations can only act through agents, in the transaction of their business, and there are matters, of which, to affect them, they, as well as individuals, must have actual notice, as in case of equities affecting negotiable instruments, or secret trusts affecting the title to lands purchased, by the party to be charged with notice.[2] Whether, therefore, the notice by which the principal is to be affected is *actual* or *constructive* depends upon the manner in which it is brought home to the agent. If the agent has actual notice, the principal is charged with notice of the same kind. If the agent is constructively notified, so is the principal.[3] But if we wish to state the rule with greater accuracy, its true meaning may be given by stating it as it is universally understood, that notice to an agent is *equivalent* to notice to the principal.

§ 673. **General Application of the Rule.**—"Notice to an agent is *constructive* notice to the principal" is one of those enunciations of doctrine which is so modified

[1] See Saffron, etc., *v.* Rayner, L. R., 14 Ch. Div., 406; *Ex parte* Larkin, id., 566; Boursot *v.* Savage, L. R., 2 Eq., 134; Atterbury *v.* Wallis, 8 DeG., M. & G., 454; Tunstall *v.* Trapps, 3 Sim., 301; Newstead *v.* Searles, 1 Atk., 265; Suit *v.* Woodhall, 113 Mass., 391; Owens *v.* Roberts, 36 Wis., 258; Distilled Spirits, 11 Wall., 356; Westervelt *v.* Haff, 2 Sandf. Ch., 98; Hovey *v.* Blanchard, 13 N. H., 145; Ames *v.* N. Y. Union Ins. Co., 14 N. Y., 253; Russell *v.* Sweezey, 22 Mich., 235; Smith *v.* Denton, 42 Iowa, 48; First National Bank of Milford *v.* Town of Milford, 36 Conn., 93; Fogg *v.* Tenn. National Bank, 9 Heisk., 479; Farrington *v.* Woodward, 82 Pa. St., 259; Wood *v.* Warren, 82 N. Y., 265; *ante*, ch. I, Constructive Notice.

[2] Bracken *v.* Miller, 4 W. & S., 102. See *ante*, § 31 *et seq.*

[3] Jones *v.* Bamford, 21 Iowa, 217; Rolland *v.* Hart, L. R., 6 Ch., 678.

in its application to different cases as to raise a doubt whether, in the form in which it is usually expressed, it may fairly be designated as a *rule*. It is true that, for all the purposes of the business to which the agency applies, the agent stands in the place and stead of the principal, and the knowledge which he acquires, in connection with the particular business of the principal, in which such agent is engaged at the time, will be imputed to the principal, whether in fact communicated or not.[1]

§ 673a. The Effect Where Actual Notice Essential.— There is no serious objection to the statement that notice to an agent is constructive notice to the principal, provided it is not taken to mean that it is *only* constructive notice, and falls short of actual notice, where actual notice is essential. The distinction between constructive and actual notice has been commented on in a former chapter.[2] We have there seen that there are circumstances under which notice which is merely a legal inference will not bind, for the reason that the statute declares that only actual notice will suffice.[3] It is also true that a purchaser for value of negotiable paper, in the ordinary course of business, before maturity, can only be affected with knowledge of defenses existing in favor of the maker, by actual notice.[4] But it is not intended in such cases to exclude notice to agents. If actual notice is communicated to an agent of the party to be bound, under circumstances that would render such notice binding upon the principal for any purpose, it will be binding as actual notice.[5] The reason why notice to the agent will bind the

[1] Whitehead *v.* Wells, 29 Ark., 99. Notice to the local agent of an insurance company, in connection with the risk assumed on behalf of the company, is notice to his principal. Coolidge *v.* Charter Oak Life Ins. Co., 1 Mo. App., 109; Holden *v.* N. Y. & Erie Bank, 6 Reporter, 692; 72 N. Y., 286.

[2] *Ante*, ch. I.

[3] Musgrove *v.* Bonser, 5 Ore., 313; Barnes *v.* McClinton, 3 Pa., 67; Hastings *v.* Cutler, 24 N. H., 481; Maupin *v.* Emmons, 47 Mo., 304; Roberts *v.* Mosley, 64 Mo., 507.

[4] Goodman *v.* Simonds, 20 How., 343; *ante*, § 80, and cases cited.

[5] Stanley *v.* Chamberlain, 39 N. J. L., 565.

principal is that for the purposes of the transaction the two are identical.[1]

§ 674. Effect of Notice Depends Upon Nature of Agency.— As we have seen in the next preceding title, that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal, of notice to the agent, depend upon the same conditions. And the great variety of circumstances affecting the relation of principal and agent, with respect to the matter under consideration, renders it exceedingly difficult to arrange them under the two heads of agents with *general*, and agents with *special*, powers. For whether the agent be one exercising general or special authority, it is quite certain that his agency must have some direct connection with the matter with reference to which notice is given.[2] As, where one who was the agent of a railroad company, and residing in the state of Iowa, became cognizant of the fact that there were two towns of the same name in that state, and another agent of the same company, who resided in Illinois, being ignorant of that fact, shipped goods belonging to plaintiff to one of such towns, which was the only one he knew of, but which proved not to be the one intended by the consignor, it was held that the company was not to be charged with notice, by reason of the knowledge of its Iowa agent, that there were two towns of the same name, so as to render it liable for the

[1] See Hart *v.* Farmers', etc., Bank, 33 Vt., 252; Porter *v.* Bank of Rutland, 19 Vt., 425.

[2] Blumenthal *v.* Brainard, 38 Vt., 402; Haywood *v.* National Ins. Co., 52 Mo., 181; Warwick *v.* Warwick, 3 Atk., 294; Mechanics' Bank *v.* Shaumburg, 38 Mo., 228; Lloyd *v.* Atwood, 3 De G. & J., 614; Finch *v.* Shaw, 19 Beav., 500; Tybee *v.* Webb, 6 Beav., 552; Abell *v.* Howe, 43 Vt., 403; Hart *v.* Farm. & Mech. Bank, 33 Vt., 252; Lawrence *v.* Tucker, 7 Greenl., 195; Hood *v.* Fahnestock, 8 Watts, 489; Bracken *v.* Miller, 4 W. & S., 102; Allen *v.* Poole, 54 Miss., 323; McCormack *v.* Wheeler, 36 Ill., 114; Pringle *v.* Dunn, 37 Wis., 449; Roach *v.* Karr, 18 Kan., 529; Smith *v.* Denton, 42 Iowa, 48; Russell *v.* Sweezy, 22 Mich., 235; Holden *v.* N. Y. & Erie Bank, 72 N. Y., 286; Bierce *v.* Red Bluff Hotel Co., 31 Cal., 160.

act of their Illinois agent, as for negligence.[1] The agency may be express or implied.[2] But to bind the two parties by the acts of an attorney, the agency for both is not implied from the fact that but one attorney is employed.[3]

§ 675. **Executive Officer of a Bank.**— Where the cashier of a bank was *ex officio* a member of the discount committee, in the absence of evidence to the contrary, he was presumed to have been present at the deliberations of the committee in reference to a bill presented for discount, and any knowledge which he may have had of equities subsisting against such bill was held sufficient to charge the bank with notice thereof.[4] It is, however, unnecessary, in general, to find these collateral circumstances, either as legal presumptions or as facts established by evidence, in order to charge a banking corporation with notice of equities against paper discounted in the course of its business, when the president, cashier, or other executive officer has knowledge of such equities.[5] In the case last cited, the cashier of the bank was also treasurer of the town. Acting as such treas-

[1] Congar *v.* C. & N. W. R. R. Co., 24 Wis., 157. Notice to a "caller" whose duty it was to call conductors as they appeared on the list was not notice to the company of the incompetency of a particular conductor on such list. The notice to bind the company should have been given to the train manager. Mich. Cent. R. R. Co. *v.* Dolan, 32 Mich., 510; Davis *v.* D. & M. R. R. Co., 20 Mich., 105. But notice to an engineer of defects in machinery held sufficient to render company responsible for the consequences. Nashville R. R. Co. *v.* Elliott, 1 Cold. (Tenn.), 611. See, also, Hoppock *v.* Johnson, 14 Wis., 303; Spadan *v.* Manvel, 2 Daley, 263; Weisser *v.* Dennison, 10 N. Y., 68; Brown *v.* Bankers', etc., Co., 30 Md., 39; Roach *v.* Karr, 18 Kan., 529; Wilson *v.* Conway Fire Ins. Co., 4 R. I., 141; Grant *v.* Cole, 8 Ala., 519.

[2] Watson *v.* Wells, 5 Conn., 468; Farrington *v.* Woodward, 82 Pa. St., 259.

[3] Fulton Bank *v.* Canal Co., 4 Paige, 127; Banco de Lima *v.* Anglo-Peruvian Bank, L. R., 8 Ch. D., 160; *In re* Marseilles, etc., Co., L. R., 7 Ch., 161; *In re* Empire Bank, L. R., 5 Ch., 358; Espin *v.* Pemberton, 3 De G. & J., 547, 554, 555; Wythes *v.* Labouchere, 3 De G. & J., 593; Perry *v.* Holl, 2 De G. & J., 38, 53.

[4] Bank of America *v.* McNeil, 10 Bush, 54.

[5] Bank of New Milford *v.* Town of New Milford, 36 Conn., 93.

urer, he gave the note of the town to the bank, for the purpose of effecting a loan for his own use. As an officer of the bank, having charge of its loans, he accepted the paper, and it was held that his knowledge of the fact that he was acting without authority as an officer of the town was the knowledge of the bank.[1]

§ 676. **Notice to Trustees.**— So, notice to one of the directors of a bank, he being a member of the discount committee, has been decided to be notice to the banking corporation; and that what was sufficient to put him upon inquiry would also charge the corporation with the duty of making inquiry in regard to the same matter.[2] So, also, where R. executed a deed of trust to secure a debt due M., and subsequently executed another deed of trust on the same property, to N. and I., as trustees, to secure a debt due a bank of which N. was the attorney, and I., a director, both the trustees having received notice of the prior incumbrance before the execution of the subsequent one, it was held that notice to them was notice to their principal, and consequently the prior incumbrance should take precedence, notwithstanding the subsequent deed was first recorded.[3]

[1] See Willard *v.* Buckingham, 36 Conn., 395.

[2] The Fulton Bank *v.* Benedict, 1 Hall, 480.

[3] Myers *v.* Ross, 3 Head (Tenn.), 60. But in order to affect *cestuis que trust* with notice to trustees, there must be subsisting between them the relation of principal and agent. It was accordingly held, in a quite recent case, that where the bonds belonging to a railroad company were conveyed in trust to certain parties for the purpose of securing its own bonds, thereafter to be issued and negotiated, notice of defenses to the bonds so held, being brought home to one or more of such trustees, would not bind the holders of the bonds so secured. The decision is based upon the ground that the trustees were the appointees of the company, and not of the *cestuis que trust.* Johnson County *v.* Thayer, 5 Cent. L. J., 245. See, also, Curtis *v.* Leavitt, 15 N. Y., 194. But the recent case of Johnson *v.* Laflin, decided by Judge Dillon, and reported in 6 Cent. L. J., 124 (5 Dill., 65), suggests a modification of the doctrine as laid down in the text. There the agent acted under the authority of a letter of attorney, executed in blank, in transferring certain shares of stock upon the books of the company. At the time the transfer was entered, the acting attorney, with whose name the blank had been filled,

§ 677. **Bound by Agent's Unlawful Acts.**— Whether the agency be general or special, and whatever be the title or designation of the agent, if he has sufficient authority in the premises to contract for the benefit of his principal, that which would affect the validity of such contract, if known to the principal at the time of making it, will have the same effect when known only to the agent.[1] Thus, where a contract was made by a servant for his master on Sunday, though this fact was unknown to the master, such contract could not be enforced where it could not have been had it

knew that the purchaser, an officer of the bank, was unlawfully using the funds of the corporation to make payment for the stock. The negotiation for the stock was between the selling broker and the purchaser, and the transaction was held complete as between the parties, by the transfer of the certificates and the receipt of the money; so that there was no such relation subsisting between the attorney making the transfer and the original seller of the stock as would charge the latter with notice of facts within the knowledge of the former contemporaneously with his action under the power of attorney. Had the facts been known to the broker employed to make the sale, there seems no doubt that the case would have been differently decided. But if the attorney in fact was not the agent of the party by whom the blank instrument was executed, at the very time he acted, by whose authority did he make the transfer? This opens the question of how far a party is chargeable with notice of facts coming to the knowledge of his agent, while acting under written authority executed in blank. This question, however, was not deemed of vital importance to the case, for the reason that the seller had a right to *demand* its transfer on the books upon the completion of the transaction between himself and the purchaser, and that direct personal notice to him after the payment of the purchase money would have been too late to affect him. It was also decided in this case that shareholders were not bound to take notice of irregularities on the part of directors in respect to the transfer of their shares, and that such shareholders, even though they be directors, in transferring their stock, are not bound to take notice of the books of account of the company — citing with approval, Bargate *v.* Shortridge, 5 House of Lords Cas., 297; Taylor *v.* Hughes, 2 Jones & Lat., 24; *Ex parte* Bagge *re* North Coal Co., 13 Beav., 162; Cartmell's Case, 9 Ch. App., 691; Hill *v.* Manchester, etc., 2 Nev. & M., 573; 5 Barn. & Adol., 874: Haynes *v.* Brown, 36 N. H., 568. See, also, Johnston *v.* Laflin, 103 U. S., 800.

[1] The Distilled Spirits, 11 Wall., 356; Bierce *v.* Red Bluff Hotel Co., 31 Cal., 160.

been entered into on that day with the knowledge of the master.[1] So where an agent to sell goods sold with the knowledge that the goods were purchased for an unlawful purpose, the principal would be affected by such knowledge, and could not recover in an action for the price.[2]

§ 678. Person Misled by Acts of Principal.— Whatever be the limits upon the authority of the agent, the principal will be bound by notice to him as to an agent with general powers, when the conduct of the principal has been such as to lead to the belief that the agency was general.[3]

§ 679. Wife Affected with Husband's Knowledge.— There are cases in which the knowledge of the husband, when acting as agent of the wife, has been held to affect her interest in the transaction. As where property was purchased for the wife by the husband acting as her agent, his knowledge that a fraud was being perpetrated was held sufficient to charge her with notice of such fraud.[4]

§ 680. Confined to Transactions in Which He Is Active.— But though the husband, by virtue of the marital relation, is a sort of general agent to transact business for his wife, acting without any authority specially conferred by her, the knowledge possessed by him will not affect her with notice in transactions with which he has nothing to do.[5] And even where a husband received a conveyance to himself and wife, by which they became possessed of an estate by the entirety, it was held that notice to the husband of a prior unrecorded mortgage would not operate as notice to the wife so as to affect her title by survivorship.[6]

[1] Smith *v.* Sparrow, 4 Bing., 84; Mosley *v.* Hatch, 108 Mass., 517; Sterling Bridge Co. *v.* Baker, 75 Ill., 139.

[2] Suit *v.* Woodhall, 113 Mass., 391.

[3] Keenan *v.* Missouri Ins. Co., 12 Iowa, 126.

[4] Clark *v.* Fuller, 39 Conn., 238; White *v.* King, 53 Ala., 162; Duke *v.* Bohm, 16 Minn., 306; Pringle *v.* Dunn, 37 Wis., 449; Willes *v.* Greenhill, 4 DeG., F. & J., 147, 150.

[5] Pringle *v.* Dunn, 37 Wis., 449.

[6] Snyder *v.* Sponable, 1 Hill, 567; *supra*, § 674, No. 2.

§ 681. Notice to One of Several Agents Sufficient.— That there are several agents who act jointly in the conduct of the business, with reference to which it is sought to affect the principal with notice, does not render it necessary, in order to charge the principal, to bring home to all the agents a knowledge of such fact. Notice to one will be as effectual as notice to all.[1] There being no difference between the obligation resting upon one of several joint agents, and that resting upon a *sole* agent, in regard to communicating facts which come to his knowledge, there can be no difference in the manner in which the possession of such knowledge will affect the principal. Where the principal is a corporation, and imposes upon its directors collectively the duty of managing its affairs and guarding its interests, and one of such directors is guilty of a breach of duty in failing to communicate to the board, when officially assembled, or to the officers of the corporation, the knowledge which he has obtained in relation to matters in which the corporation is interested, it should be the sufferer by such concealment, rather than an innocent party whose interests are involved in the transaction.[2]

§ 682. Director of a Bank.— Accordingly, in a case where one of the directors of a bank had notice of the fraudulent perversion from the objects for which they were drawn, of certain bills, and with that knowledge was present at a meeting of the board where the same bills were presented for discount, his knowledge was properly held to be the knowledge of the bank.[3]

§ 683. Corporation Not Affected with Every Fact Known to Directors.— However, the mere fact that a bank director

[1] Fulton Bank *v.* N. Y. & S. Canal Co., 4 Paige, 127; North River Bank *v.* Aymar, 3 Hill, 262; Willes *v.* Greenhill, *supra;* Bank of U. S. *v.* Davis, 2 Hill, 451, 464.

[2] The language of the text must be taken as qualified by § 683*a* and authorities cited *infra.*

[3] Bank of United States *v.* Davis, 2 Hill, 451; Nat. Security Bank *v.* Cushman, 121 Mass., 490; Clerks' Savings Bank *v.* Thomas, 2 Mo. App., 367; Edwards *v.* Thomas, id., 282.

is in possession of certain knowledge which would prevent his becoming an innocent holder would not affect the bank if the paper should be received there and discounted, without his knowledge. It could hardly be his duty to report to his bank every fact coming to his notice, in relation to all the negotiable paper of which he may have any knowledge, where he had received no intimation that such paper would be presented there for discount.[1] But some of the cases cited in the note will be found to go much farther, and take the ground that the bank cannot be affected by notice to one of its directors, for the reason that such directors, in their individual capacity, are neither *officers* nor *agents* of the corporation. This distinction, however, is not supported by the weight of authority.[2] The best considered cases do not seem to favor the exemption of corporations from the duty of taking notice of facts known to their directors, any further than is here stated.[3]

683a. Notice to Directors of Corporation.—It is not a mere question whether the notice is actually communicated to one or several of the directors, nor even to each of them. The directors, when convened and acting for the corporation, stand to the corporate body in a relation somewhat closer than that of ordinary agency. They are, to all intents and purposes, when acting within the scope of the powers conferred by their charter, the corporation itself. As individuals, however, they are mere agents, if they have any individual

[1] Louisiana State Bank *v.* Senecal, 13 La., 525; General Ins. Co. *v.* U. S. Ins. Co., 10 Md., 517; Farmers' & Citizens' Bank *v.* Payne, 25 Conn., 444; Nat. Bank *v.* Norton, 1 Hill, 572; Washington Bank *v.* Lewis, 22 Pick., 24; Hartford Bank *v.* Hart, 3 Day, 491; Housatonic Bank *v.* Martin, 1 Met., 308; Farrell Foundry *v.* Dart, 26 Conn., 376; Miller *v.* Ill., etc., R. Co., 24 Barb., 313; Suit *v.* Woodhall, 113 Mass., 391.

[2] Smith *v.* Water Com'rs, 38 Conn., 208; Fogg *v.* Tennessee Nat. Bank, 9 Heisk., 479; Fulton Bank *v.* Canal Co., 4 Paige, 127; New Hope Bridge Co. *v.* Phœnix Bank, 3 N. Y., 156; Branch Bank *v.* Steele, 10 Ala., 915; Holden *v.* N. Y. & Erie Bank, 72 N. Y., 286; North River Bank *v.* Aymar, 3 Hill, 262; First Nat. Bank *v.* Town of Milford, 36 Conn., 93.

[3] *Supra.*

authority beyond that of voting at the deliberations for which they are convened. Mere casual knowledge of facts, acquired by one of the directors while in pursuit of his private business, with no intimation that they would affect the corporation, would not amount to notice to the corporate body.[1] Where one of the directors of a bank indorsed a note with knowledge that it was given without consideration, this was held insufficient to charge the bank, in discounting the paper, with notice of want of consideration, although the indorsing director was present when it was discounted, unless he were constituted an organ of communication between the bank and those dealing with it.[2] Where the fact in question comes to the knowledge of the director or officer of a corporation when he is not only acting unofficially, but is dealing with the company as a stranger, or the position in which he stands brings his individual interest in conflict with that of the corporation, there is an additional reason for not imputing his knowledge to the institution he represents. His position, for the purposes of that transaction, is that of a stranger to the corporation.[3] But where a fact is communicated to an individual director for the purpose of bringing it to the attention of the corporation, it will be effectual, though he negligently or fraudulently fails to communicate it.[4] And where he acts for the corporation in the transaction of the business in respect to which it is sought to charge it with notice; as where he, as one of the board of directors, authorizes the discount of a

[1] Loomis *v.* Eagle Bank, etc., 2 Disney (Ohio), 285; Powles *v.* Page, 3 M., G. & S., 16.

[2] Custer *v.* Tompkins County Bank, 9 Pa. St., 27.

[3] Winchester *v.* Baltimore R. Co., 4 Md., 238; U. S. Insurance Co. *v.* Shriver, 3 Md. Ch., 388; Gen'l Ins. Co. *v.* U. S. Ins. Co., 10 Md., 527; Commercial Bank *v.* Cunningham, 24 Pick., 270; Louisiana State Bank *v.* Senecal, 13 La., 525; Terrell *v.* Bank of Mobile, 12 Ala., 502; Washington Bank *v.* Lewis, 22 Pick., 30; Sawyer's *v.* Pawner's Bank, 6 Allen, 207; First Nat. Bank *v.* Christopher, 40 N. J. L., 435.

[4] U. S. Ins. Co. *v.* Shriver, 3 Md. Ch., 388. See, also, La Farge Ins. Co. *v.* Bell, 22 Barb., 54.

note procured by fraud, of which he had notice, the bank would be bound as though his knowledge had been communicated to the entire board.[1] When the fact in question comes to the knowledge of a director or other officer when he is making authorized official inquiry, or is otherwise engaged officially for his principal, it can be of no consequence that he fails to communicate it,[2] or even that it was not communicated to him for the purpose of informing the corporation.

§ 683b. Notice to Corporations Through Their Executive Officers.—The principal matter that determines whether a corporation may be affected with notice to one of its officers is the nature of the duties of such officer, and whether they are connected with the facts brought to his attention. A corporation will always be affected when the notice comes to it through an officer within whose special line of duty the matter in question lies.[3] But where the duties of the officer served are entirely disconnected with that branch of the business to which the notice relates, it must be held otherwise. When, however, the notice is served upon one who has a general supervision of the business, embracing the transaction to which the notice relates as well as others, no good reason is apparent why it should not be regarded as notice to the corporation.[4] The cashier of a bank is the particular officer who has charge of the

[1] National Security Bank *v.* Cushman, 121 Mass., 490. See, in this connection, Farmers', etc., Bank *v.* Paine, 25 Conn., 446; Bank of U. S. *v.* Davis, 2 Hill, 454: North River Bank *v.* Aymar, 3 Hill, 263; Bank of Pittsburgh *v.* Whitehead, 10 Watts, 402; Suit *v.* Woodhall, 113 Mass., 391.

[2] New York, etc., R. Co. *v.* Schuyler, 34 N. Y., 30; Marshall *v.* Columbian Ins. Co., 27 N. H., 157.

[3] Bank of Virginia *v.* Craig, 6 Leigh, 399; Fall River, etc., Bank *v.* Sturtevant, 12 Cush., 372; Bank of St. Mary's *v.* Mumford, 6 Ga., 44; Tiffany *v.* Boatman's Inst., 18 Wall., 375.

[4] Porter *v.* Bank of Rutland, 19 Vt., 410; Smith *v.* Board of Water Commissioners, 38 Conn., 208; Bank of Pittsburgh *v.* Whitehead, 10 Watts, 397; Union Mining Co. *v.* Rocky Mountain Nat. Bank, 2 Colo., 249.

ordinary business of the bank, and for this reason notice of facts affecting its business will bind the corporation.[1] So where a cashier was *ex officio* member of the discount committee, and knew that a stockholder had pledged his stock to secure a debt, after which the latter presented a note for discount at the bank. The note was received by the bank while the cashier knew of the pledge of the stock. The stockholder becoming insolvent, the bank claimed a prior lien on the stock as security, which claim was disallowed upon the principle that the cashier was presumed to have acted with the committee, with knowledge of the fact that the stock was pledged, and such knowledge would bind the corporation for which he acted, whether it was communicated to the rest of the committee or not.[2] The same exception is made in case of an officer dealing with the corporation as a customer that applies to directors. When the officer transacts business *with* the corporation instead of *for* it, he is supposed to treat with it at arms-length, and not to disclose facts against his own interest.[3]

§ 684. Joint Purchasers Not Principal and Agent.— The mere circumstance that two persons are jointly interested in a purchase will not establish between them the relation of mutual agency, so that notice to one will affect the other, even with respect to the property of which they are joint tenants.[4] But when notice is given to one of several partners in connection with the business of the partner-

[1] Duncan *v.* Jaudon, 15 Wall., 165; Reynolds *v.* Kenyon, 43 Barb., 585; Gould *v.* Cayuga County, etc., Bank, 56 How. Pr., 505; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq., 117; Branch Bank *v.* Steele, 10 Ala., 915.

[2] Bank of America *v.* McNeil, 10 Bush, 54.

[3] Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq., 33. In a recent case decided by the supreme court of Nevada, it was held that where it was necessary to give notice to a corporation which had no legal officers or trustees, a notice given to the owner of all the stock who managed and directed its business was sufficient. Orr Water Ditch Co. *v.* Reno Water Co., 5 West Coast Rep., 666.

[4] Flagg *v.* Mann, 2 Sumn., 486; Snyder *v.* Sponable, 1 Hill, 567; 7 id., 427.

ship, his copartners will be affected; and this has been put upon the ground of mutual agency.[1]

§ 685. The Same Kind of Notice to Principals as to Agents.— Notice to an agent, in order to bind the principal, need not be any more full or circumstantial in its details than would suffice had it been directly to the principal. Where a subsequent purchaser is to be charged with notice, it is not essential that the agent should be informed of every fact which it is important for the principal to know. It will generally be a good notice if it is sufficiently explicit to put the agent upon inquiry leading to the truth.[2]

§ 686. To Agent of Agent Not Sufficient.— To have the effect of bringing knowledge home to the principal the notice must be to *his* agent, and not to any agent or attorney employed by such agent. It was so held where the question arose under the general bankrupt law, in deciding whether or not the principal had received a preference.[3] The principal, residing in New York, employed an attorney there to collect a sum of money due from a debtor resident in Omaha, Nebraska. For purposes of his own convenience, and without consulting his client, the attorney employed another attorney at Omaha, who, being aware of the debtor's insolvent condition, collected the debt and transmitted the sum collected to the New York attorney, and within two months thereafter the debtor was declared bankrupt. It was held that the Omaha attorney was the agent of the attorney by whom he was employed, and not of the client who ultimately received the money. Hence, the notice of insolvency, not being to the agent of the creditor, he was held unaffected thereby.

§ 687. Place, Manner and Time of Acquiring Knowledge.— When at the time of a transaction by one acting in

[1] Watson *v.* Wells, 5 Conn., 468.

[2] Barnes *v.* McClinton, 3 Pa., 67; Fulton Bank *v.* Benedict, 1 Hall, 480; *ante*, § 33; Hart *v.* Farmers' & Mechanics' Bank, 33 Vt., 252.

[3] Hoover *v.* Wise, 91 U. S., 308; S. C., 3 Cent. L. J., 276; S. C., 14 N. B. R., 264.

the capacity of agent, the recollection of the fact with notice of which it is sought to charge the principal is present to the mind of the agent, *wheresoever*, *howsoever* or *whensoever* the knowledge of such fact was obtained, such knowledge will be the knowledge of the principal, provided it come to the agent in a manner that he might communicate it, or act upon it, without being guilty of a positive violation of duty.[1] This doctrine is advanced with some hesitancy, not because of any doubt as to its soundness, on principle, or as to its being supported by the best authority; but there has been such a contrariety of opinion expressed upon the subject, by the courts of the different states, that it would be impossible to make any statement of a general rule which will be universally accepted and acted upon.

§ 688. Same — When to be Considered.— In cases where the doctrine announced above is questioned, it is insisted either that *the knowledge should be acquired by the agent, during the agency;*[2] or that *it should come to him in such a manner, and under such circumstances, that he may be presumed to have communicated it to his principal.*[3] There can

[1] Le Neve *v.* Le Neve, 3 Atk., 646; S. C., 2 Lead. Cas. in Eq., Pt. 1, p. 35; Brotherton *v.* Hatt, 3 Vern., 574; Dresser *v.* Norwood, 17 C. B., N. S., 466; Williams *v.* Tatnall, 29 Ill., 553; Wiley *v.* Knight, 27 Ala., 336; The Distilled Spirits, 11 Wall., 356; Hart *v.* Farmers' & Mechanics' Bank, 33 Vt., 252; Patton *v.* Ins. Co., 40 N. H., 375. See, also, Pritchett *v.* Sessions, 10 Rich. Law, 293; Holden *v.* N. Y. & E. Bank (Ct. of Ap. N. Y., 1878), 6 Reporter, 692.

[2] Hood *v.* Fahnestock, 8 Watts, 489; N. Y. Cent. Ins. Co. *v.* Nat. Prot. Ins. Co., 20 Barb., 468; Smith's Appeal, 47 Pa. St., 128; Mehan *v.* Williams, 48 Pa. St., 238; Day *v.* Walmsley, 33 Ind., 145; Blumenthal *v.* Brainard, 38 Vt., 402; Haywood *v.* National Ins. Co., 52 Mo., 181; Warwick *v.* Warwick, 3 Atk., 291; Norris *v.* Le Neve, 3 Atk., 26; Mechanics' Bank *v.* Shaumburg, 38 Mo., 228; Howard Ins. Co. *v.* Halsey, 8 N. Y., 271; McCormack *v.* Wheeler, 36 Ill., 114; Houseman *v.* Mutual Build. & Sav. Ass'n, 81 Pa. St., 256; Lloyd *v.* Atwood, 3 De G. & J., 614; Tybee *v.* Webb, 6 Beav., 552; Ashley *v.* Baillie, 2 Ves. Sr., 368; Lawrence *v.* Tucker, 7 Greenl., 195; Abell *v.* Howe, 43 Vt., 403.

[3] Winchester *v.* Baltimore R. R. Co., 4 Md., 231; La Farge Ins. Co. *v.* Bell, 22 Barb., 54; Thompson *v.* Cartwright, 33 Beavan, 178; Kenedy *v.* Green, 3 Mylne & K., 699.

be no doubt that when the notice comes to the agent before the relation is established, and the question whether at the time of the transaction as agent the recollection of the fact was present to his mind, depends for its solution upon mere inference, or presumption from his previously acquired knowledge, *time* is a very important matter for consideration. If the fact came to the knowledge of the agent long before the commencement of the agency, it would not be safe to infer that he recollected it when the transaction with the agent took place. And in most of the cases where time is insisted on, this seems to be the consideration operating upon the mind of the court. As in the case of Warwick *v.* Warwick,[1] the agent alleged to have been possessed of knowledge was dead, and there seems to have been no evidence that he recollected the fact, when acting as agent of the party to be charged. So in Day *v.* Walmsley,[2] goods were sold to the defendant's wife, by a salesman, who, previous to his employment, had heard in an idle conversation that defendant and wife had separated. There being no better evidence that he knew of the fact of separation at the time of selling the goods, it was held that this would not be sufficient to affect plaintiff, the employer of the salesman, with notice of such fact. So, also, in the case of Bracken *v.* Miller,[3] the knowledge of a secret trust was gained by the attorney seven years before he was employed by the party sought to be charged with notice of such trust. And other cases might be cited, where time was a question of real importance in determining the validity of the notice.

§ 689. Knowledge Acquired During Agency.— But in many of those cases in which the doctrine is recognized that notice should come to the agent after the relation has been established, an exception is admitted which tacitly concedes that the important matter to prove is that the agent was cognizant of the fact when he acted for his principal, and

[1] 3 Atk., 291.
[2] 33 Ind., 145.
[3] 4 W. & S., 102.

not that he acquired the knowledge at any particular time. The exceptional cases are those where the transactions follow each other so closely that it is regarded as impossible for the agent to have forgotten the *first* when the second took place. It is therefore held that the agent's knowledge, acquired in the course of the first transaction, would be notice to the principal, though the relation of principal and agent only subsisted between them in respect to the second transaction.[1] This is a virtual abandonment of the principle upon which the distinction is founded.

§ 690. **Agent's Duty to Communicate.**— The restriction of the rule to cases where there is a probability that the agent will communicate the knowledge seems to have had its origin in a total misapprehension of the purposes for which the rule was established. It tends to defeat the application of the doctrine to cases where it is most essential in the promotion of good faith and fair dealing. One of the most striking cases of the application of this distinction is that of Thompson *v.* Cartwright.[2] Here a solicitor acted for both parties in preparing a deed which contained the

[1] Winter *v.* Lord Anson, 1 S. & S., 434; S. C., 3 Russ., 488; Hargreaves *v.* Rothwell, 1 Keen, 154; Fogg *v.* Tennessee National Bank, 9 Heisk., 479; Holden *v.* N. Y. & E. Bank, 72 N. Y., 286; Ames *v.* N. Y. Union Ins. Co., 14 N. Y., 253; Hart *v.* Farmers' & Mechanics' Bank, 33 Vt., 252; Abell *v.* Howe, 43 Vt., 403; Wiley *v.* Knight, 27 Ala., 336; Pritchett *v.* Sessions, 10 Rich. (Law), 293; Dunlap *v.* Wilson, 32 Ill., 517; Williams *v.* Tatnall, 29 id., 553; Hovey *v.* Blanchard, 15 N. H., 145; Patten *v.* Ins. Co., 40 id., 375; The Distilled Spirits, 11 Wall., 356; Fuller *v.* Bennett, 2 Hare, 394; Atterbury *v.* Wallis, 8 De G., M. & G., 454; Perkins *v.* Bradley, 1 Hare, 219; Porter *v.* Bank of Rutland, 19 Vt., 410; Rolland *v.* Hart, L. R., 6 Ch., 678–82; Pepper *v.* George, 51 Ala., 190; G. W. R'y Co. *v.* Wheeler, 20 Mich., 419; May *v.* Borel, 12 Cal., 91; Hodgkins *v.* Montgomery County Ins. Co., 34 Barb., 213; Fry *v.* Shehee, 55 Ga., 208; Mountford *v.* Scott, T. & R., 274; Nixon *v.* Hammilton, 2 Dr. & Wal., 364; Perkins *v.* Bradley, 1 Hare, 219.

[2] 33 Beav., 178. See, also, Cove *v.* Cove, L. R., 15 Ch. Div., 639; Waldy *v.* Gray, L. R., 20 Eq., 238; Hiorns *v.* Holton, 16 Beav., 259; Trail *v.* Ellis, 16 Beav., 350; Neesom *v.* Clarkson, 2 Hare, 163; Barnes *v.* Trenton, etc., Co., 27 N. J. Eq., 33; Winchester *v.* Railroad, 4 Md., 231.

usual covenants against prior incumbrances. The same solicitor had previously prepared a mortgage upon the identical property, which mortgage, however, had not been registered. There was no question of the fact being present to the solicitor's recollection at the time of drawing the second deed, and it was decided that upon the party sought to be charged with notice rested the burthen of overcoming the legal presumption that his agent had communicated such fact. No direct evidence was offered upon this point; but the court held that the fact that the solicitor was also employed by the party whose interest it was to conceal the prior mortgage was sufficient circumstantial evidence that it was concealed from the principal, and he was therefore unaffected by the agent's knowledge. Leaving out of consideration the probable event of its being utterly impossible for the agent to communicate the knowledge in time, the case cited above fairly illustrates the danger of resting the rule upon the presumption that the agent communicates the knowledge of which he is possessed, unless such presumption is conclusive. The doctrine announced in this case is against the weight of authority, both in England and in this country.[1]

§ 691. Where Agent's Authority Depends Upon Ratification.— If one without authority assume to act as the agent of another, and the latter take the benefit of the unauthorized act, by claiming rights under it, or otherwise ratifying the acts of his self-appointed agent, he must take such ben-

[1] Willard *v.* Buckingham, 36 Conn., 395; Bank of U. S. *v.* Davis, 2 Hill, 451; The Distilled Spirits, 11 Wall., 356; Le Neve *v.* Le Neve, 3 Atk., 646; S. C., 2 Lead. Cas. Eq., Pt. 1, p. 351; Brotherton *v.* Hatt, 2 Vern., 574. But the rule rests upon the duty to communicate. Rolland *v.* Hart, L. R., 6 Ch., 678; Jones *v.* Bamford, 21 Ia., 217; Hewitt *v.* Loosemore, 9 Hare, 449; Kenedy *v.* Green, 3 My. & K., 699; Dryden *v.* Frost, 3 My. & Cr., 670; Tweedale *v.* Tweedale, 23 Beav., 341; Fuller *v.* Bennett, 2 Hare, 394, 402; Losey *v.* Simpson, 3 Stockt. Ch., 246; Tucker *v.* Henzill, 4 Ir. Ch. R., 513; *In re* Rorke, 13 id., 273; 14 id., 442; Owens *v.* Roberts, 36 Wis., 258; Suit *v.* Woodhall, 113 Mass., 391; Bradley *v.* Riches, L. R., 9 Ch. D., 189–96.

efit, charged with notice of such matters as appear to have been within the knowledge and recollection of the agent at the time of the transaction.[1] In the case cited, the grantor in a prior unrecorded conveyance acted as the agent of his creditor in directing the levy of an attachment upon the same property. The creditor, by claiming rights under the levy, ratified the agency, and was charged with knowledge of the prior conveyance, though the fact was never communicated to him by the agent. So where B., having notice of an incumbrance, purchased in the name of M., whom he afterwards agreed should become the purchaser direct, and M. accordingly paid the purchase money, without notice of the incumbrance, it was held that although he did not employ B., nor knew anything of the purchase until after it was made, yet by his subsequent approval he made B. his agent *ab initio*, and was therefore affected with notice.[2] In general, such ratification, to bind the principal, must be made with full knowledge; but when the principal relies on the contract made by his unauthorized agent, as a basis of recovery, he thereby adopts the contract, and cannot escape the consequences by showing that he was not fully informed of its terms and conditions.[3]

§ 692. Notice to Attorneys — Breach of Confidence to Disclose. — It seems to be quite generally conceded that where knowledge of a fact is acquired by an attorney while in the course of the discharge of his duties, under circumstances that would render it a breach of professional confidence for him to communicate the fact to another client, or to take advantage of such knowledge to promote the interests of the other client, the knowledge of the attorney would not be imputed to his client, from whom it was so withheld.[4]

[1] Hovey *v.* Blanchard, 13 N. H., 145.
[2] Jennings *v.* Moore, 2 Vern., 609.
[3] Henderhen *v.* Cook, 66 Barb., 21.
[4] Hood *v.* Fahnestock, 8 Watts, 489; McCormick *v.* Wheeler, 36 Ill., 115.

§ 693. **Executor and Administrator.**— It has also been held that in order to charge an executor or administrator with notice of a fact affecting the interests of the estate of decedent, the knowledge must be acquired after his appointment, at least not during the life-time of decedent.[1] But under the later and better authorities, both English and American, we have seen that this restriction can only operate to weaken the presumption of notice from knowledge previously acquired, and will depend upon the length of time intervening.[2]

§ 694. **Knowledge of Trustee Before Creation of the Trust.**— This rule has been applied, with the restriction as to time, to cases where it was sought to charge with notice the *cestuis que trust*, or beneficiaries in deeds of trust, by proving notice to their trustees.[3] The case first cited in the note is one of those in which the general principle is seized upon to negative the inference that knowledge acquired by the trustee long before there was any thought of the deed of trust was present to his recollection when he became the trustee, and so leave the principal an avenue of escape from the consequences of his trustee's knowledge. Had the same general restriction been applied to the case of Myers *v.* Ross,[4] the prior incumbrancer would have been defeated in a case where notice of the prior incumbrance was given one day, and the party notified was made trustee in the subsequent deed of trust of the same property on the next. In fact, under a strict adhesion to this restriction, beneficiaries could never be charged with notice of prior incumbrances by bringing home knowledge to their trustees; for, as they do not become trustees until the execution of the deed by which the trust is created, it would be impossi-

[1] Gold *v.* Death, Hobart, 92; Henry *v.* Morgan, 2 Binney, 497.

[2] *Supra*, § 687 *et seq.*

[3] Willis *v.* Vallette, 4 Metc. (Ky.), 186; Henry *v.* Morgan, 2 Bin., 497; Willes *v.* Greenhill, 4 De G., F. & J., 147, 150; Myers *v.* Ross, 3 Head, 59; *supra*, § 676.

[4] 3 Head (Tenn.), 60; *supra*, § 676.

ble for them to receive the notice until it had become too late to communicate it with any effect.

§ 695. **Notice of Torts of Agents and Servants.**— Notice by which the liability of a party for a *tort* is fixed may come through the agent, with like effect as when communicated directly to the principal. As where the superintendent of a street railway was notified of the misconduct of an employee of the company toward a passenger, the knowledge thus acquired by the agent was regarded as the knowledge of the principal and was held sufficient to fix the company's liability for exemplary damages on account of such misconduct, when, after such notice, the act of the employee was approved.[1] So where a servant had charge of his master's vicious dog, the master having no knowledge of the animal's dangerous disposition, was held liable for injuries committed by him, upon the ground that the servant's knowledge was equivalent to notice to the master.[2] So, also, in an action for damages for the burning of plaintiff's property by sparks escaping from the chimney of defendant's mill, it was held that, in the absence of the mill owner, notice of the dangerous condition of the chimney to the foreman in charge was equivalent to notice to his employer.[3]

[1] Malick *v.* Tower Grove & Lafayette R. R. Co., 57 Mo., 17.
[2] Baldwin *v.* Cassella, L. R., 7 Ex., 325; *ante*, § 480*i*.
[3] Hoyt *v.* Jeffers, 30 Mich., 181; *ante*, § 480*k*.

III. Notice by an Agent.

§ 696. Has the Same Force as When Given by Principal.
697. Notice of Dishonor of Commercial Paper.
698. Notice to Quit.
699. Written or Verbal.
700. Effect of Subsequent Ratification.
701. Notice Unauthorized When Given, Valid Only from Time of Ratification.

§ 696. Has the Same Force as When Given by Principal.— In most instances where notice is necessary to fix the liability of a party, or where such liability may be altered, modified or discharged by notice, such notice may be communicated by an agent, with the same effect as when given by the principal. In order to determine the validity of a notice given by an agent, it is often an important matter of inquiry whether the giving of the notice is within the scope of the agent's powers. The same principles that govern the giving of notice *to* an agent so as to bind his principal[1] will not always apply to the notice given *by* an agent so as to bind the party notified. For the purpose of affecting a purchaser with notice of any defect of title or secret equity with respect to the thing purchased, it is not always necessary to establish the relation of principal and agent between his informant and the vendor. It is in most cases sufficient to prove that the information was communicated by some one whose situation, or relations to the parties, were such as to render it incumbent upon the purchaser to heed the warning.[2] Nevertheless, one contemplating a purchase may disregard mere idle and vague rumors respecting the property, which have no authoritative foundation whatever.

§ 697. Notice of Dishonor of Commercial Paper.— For reasons peculiar to the law governing negotiable instruments, and which are entirely disconnected with the law of

[1] *Ante*, II, Notice to an Agent.
[2] *Ante*, § 27 *et seq.*

agency, notice of the dishonor of a note or bill, when given by any one of the parties to such instrument who had become liable thereon, may be taken advantage of by the others.[1] It seems, also, that notice of dishonor may be given by any party to a bill,[2] without regard to his own liability. But where such notice is permitted to be given effectually, by one not contingently liable as indorser or drawer, the notice is supported upon the ground that the party giving it acted as the agent of the party whose duty it was to give notice.[3] It is quite certain, however, that an agent in whose hands the paper has been placed for presentation may give notice of its dishonor, either in his own name, or as agent of the real holder.[4]

§ 698. Notice to Quit.— But when an estate or right is to be determined or affected by notice to the party in whom the same is vested, whether such notice be stipulated for by contract or be required by law, it must come from the party who, by law or the terms of the contract, is clothed with the power of terminating the estate, or affecting the right in this manner, or from his *duly authorized agent*.[5] Of this character are *notices to quit*, from landlord to tenant. The reasons why the tenant could not safely respond to a notice to quit from an unauthorized person are so plain as not to require explanation. He is entitled to such notice as he may act upon with the assurance that the landlord desires to terminate the tenancy, and this can only be by a notice coming from some one with authority from the landlord himself;[6] although it has been held unnecessary, where such

[1] Chapman *v.* Keane, 3 Ad. & Ell., 193; Jameson *v.* Swinton, 2 Camp., 373; Batchelor *v.* Priest, 12 Pick., 399. See § 703, ch. X.

[2] 3 Kent's Com., 108.

[3] 2 Daniel on Negot. Inst., § 991; Mt. Pleasant Bank *v.* McLeran, 26 Ia., 306; Glasgow *v.* Pratte, 8 Mo., 336.

[4] Bank of State of Mo. *v.* Vaughan, 36 Mo., 90; Fulton *v.* McCracken, 18 Md., 528; Burke *v.* McKay, 2 How., 66; Woodthorpe *v.* Lawes, 2 M. & W., 109. See § 714 *et seq.*

[5] Goodtitle *v.* Woodward, 3 B. & Ald., 689.

[6] Right *v.* Cuthell, 5 East, 491.

notice was given by an agent of the landlord, that the tenant should have evidence, satisfactory to himself, that the one assuming to act as agent was authorized to give the notice.[1]

§ **699. Written or Verbal.**— As to the manner of giving notice to quit, this will be more fully treated in another chapter;[2] but where written notice is not required when given by the landlord in person, verbal notice will be equally good from the agent.[3]

§ **700. Effect of Subsequent Ratification.**— There does not seem to be entire harmony between the authorities as to the curative effect of ratification upon notice given by one falsely assuming to act as agent of the landlord. As a general rule, subsequent ratification, as we have seen, when made with knowledge of all the circumstances, will render binding upon the principal either the acts of an unauthorized agent or the unauthorized acts of an agent.[4] The same principle will apply to the acts of an agent in giving notice to quit, so far as it is calculated to bind the landlord who ratifies it; but whether such subsequent ratification should render the notice retroactive, so as to bind the tenant, raises quite a different question. In some of the cases, however, it seems to be held that even a suit founded upon such notice will be sufficient ratification to render the notice good though given by one who acted without authority.[5] But both the weight of authority and the better reason are the other way. In the case of Right *v.* Cuthell,[6] where the power of determining a lease by notice was in three persons, to be exercised jointly, only two of whom signed the notice, it was decided not to be good, and being a notice

[1] Roe *v.* Pierce, 2 Camp., 96; Brahn *v.* Jersey City Forge Co., 38 N. J. L., 74.

[2] *Ante*, ch. VIII, part III.

[3] Roe *v.* Pierce, 2 Camp., 96.

[4] *Ante*, §§ 667, 668.

[5] Goodtitle *v.* Woodward, 3 B. & Ald., 689; Roe *v.* Pierce, 2 Camp., 96.

[6] 5 East, 491.

which the tenant was to act upon at the time, a subsequent ratification by the other person would not render it valid by relation. The notice was held bad for uncertainty, as the tenant would not know whether to quit or not until after the ratification.

§ 701. Notice Unauthorized When Given, Valid Only from Time of Ratification.— This principle would apply with still greater force where the landlord is required to give notice for a stated number of days. In such case the prescribed time should elapse, not only subsequent to the giving of the notice and the ratification, but also between notice of such ratification and the time fixed for quitting. Where the notice is unauthorized when given, it can only be considered valid from the time it is ratified by the principal.[1] And though in a recent American case it was held not to be necessary that the agent should have express authority, in order to bind the tenant by notice, yet such authority should be at least inferred from the concurrence of the principal; and if the giving of the notice was an unauthorized act, a subsequent assent on the part of the landlord would not operate by relation to render it good.[2]

[1] Doe *v.* Walters, 10 Barn. & Cres., 626; Doe *v.* Goldwin, 2 Ad. & Ell., 143.

[2] Brahn *v.* Jersey City Forge Co., 38 N. J. L., 74.

CHAPTER X.

NOTICE OF DISHONOR OF COMMERCIAL PAPER.

I. By Whom Given.
II. To Whom Given.
III. Time of Giving Notice.
IV. Manner and Mode.
V. Waiver and Excuse.

I. By Whom Notice May be Given.

§ 702. Generally it Must be by Holder.
703. By Any Party to the Instrument.
704. Criticism of Authorities by Judge Story.
705. Party Discharged Becomes a Stranger.
706. Party Not Notified Not Immediately Discharged.
707. Doctrine Declared by Chitty.
708. Notice Given by Party Before Received.
709. General Acceptance of the Above Doctrine.
710. Notice by Acceptor.
711. By Acceptor *Supra Protest*.
712. By Drawee of Bill.
713. By Maker of Note.
714. By an Agent.
715. By Agent for Collection, or by Notary.
716. Holder, to Give Notice, Need Not be Owner.
717. By Successive Agents, to Each Other.
718. Signing Wrong Name Will Not Affect Notice from Proper Party.
719. Otherwise Where Attorney Has No Authority by Party Whose Name is Used.
720. Authority to Give Notice Implied.
721. Holder as Security May Give Notice.
722. Notice from Stranger Adopted by Holder.
723. Party Giving Notice May Have No Knowledge at Time.
724. Notice by Executor.
725. By Assignee in Bankruptcy.
726. When by the Bankrupt.
727. By Guardian or Ward.
728. By Married Woman.

§ 702. **Generally it Must be by Holder.**— In general, the notice of dishonor of negotiable paper comes in the first instance from the holder at the time of demand and refusal of payment, or presentment for acceptance, and refusal by the drawee to accept.[1] It has, indeed, been laid down as a rule, that in order to bind antecedent parties, the notice should, in every instance, come from the holder in whose hands the instrument was dishonored.[2] The doctrine announced in this case was approved by Lord Eldon in the subsequent case of *Ex parte* Barclay.[3] The reasons given for thus deciding the latter case were, substantially, that the holder was the only one who could rely upon the others for payment, and, consequently, notice from one who was not in a position to avail himself of the liability of an antecedent party, could not authoritatively advise the party notified that he was held to the terms of his contract. In other words, if A. were the holder of a bill, acceptance of which was refused, and B. was his immediate indorser, in case notice of the dishonor was given by B. to the drawer, A. could not avail himself of such notice in order to hold the drawer, because B. would have no authority to say to the drawer that A. relied upon him for payment.

§ 703. **By Any Party to the Instrument.**— But directly in conflict with the authorities cited above, are the cases of Jameson *v.* Swinton,[4] and Wilson *v.* Swabey,[5] in both of which the doctrine is laid down, that notice coming from any antecedent party to the instrument will enable the holder or subsequent indorser to hold the party notified either as drawer, or upon his contract of indorsement. Upon the authority of the cases last cited, Lord Denman took occasion to review Tindal *v.* Brown,[6] and expressly overruled

[1] Walker *v.* Bank of the State, 8 Mo., 704; Gindrat *v.* Mechanics' Bank, 7 Ala., 324.

[2] Tindal *v.* Brown, 1 T. R., 164.

[3] 7 Ves., 597.

[4] 2 Camp., 373.

[5] 1 Stark., 34.

[6] 1 T. R., 164.

the case, declaring the doctrine therein promulgated not to be good in law.[1] In this case the plaintiff had indorsed a bill upon which defendant was antecedently liable, and the indorsee of plaintiff was the holder of the bill when it reached maturity. The holder left the bill in the hands of plaintiff's clerk with instructions to present the same, and, in case of non-payment, to give notice of dishonor. The bill was duly presented, payment refused, and the clerk, instead of giving notice to the plaintiff and to the defendant, *in the name of the holder*, by whom he was authorized to act, simply gave notice to *defendant*, in the name of the *plaintiff* — the last indorser. Plaintiff subsequently took up the bill, and in the action brought, it was held, in opposition to the rule announced in the overruled case, that the notice was sufficient, notwithstanding it was not from the holder at the time such notice was given.

§ 704. Criticism of Authorities by Judge Story. — Mr. Bayley, in his work on Bills,[2] attempts to limit the application of the above doctrine to cases where the party from whom the notice comes is himself bound to pay the bill or note. Judge Story cites Mr. Bayley with approval, and objects to the breadth of statement employed in most of the cases, as intimating that notice by parties would be sufficient, regardless of the fact that they might not themselves be liable to pay the same, or be entitled to reimbursement.[3] Says the learned author in this connection, "Suppose, for example, a second indorser should give notice to a first or third indorser, having received none himself, and therefore not being bound to pay the note, and the holder has not given any notice whatsoever to any of the indorsers, the question in such a case would arise, whether the notice was available in favor of the holder. Suppose the last indorser has received no notice from the holder, and is therefore discharged, would notice by him to the prior indorsers be available for the holder?"

[1] Chapman *v.* Keane, 3 Ad. & Ell., 193.

[2] Bayley on Bills, 248.

[3] Story on Prom. Notes, § 303, citing Bayley on Bills (5th ed.), 254.

§ 705. **Party Discharged Becomes a Stranger.**— It is conceded on all sides that the notice must emanate from a party to the bill, and many of the earlier authorities, both English and American, hold that it must come from a party who can give the drawer or indorser his immediate remedy on the bill; otherwise it is merely a historical fact.[1] But the rule that notice must come from a party to the bill is only confused by insistence upon the doctrine that notice cannot be effectually given to a prior indorser by a subsequent indorser who has been discharged. For when an indorser has been discharged from liability on the bill or note by failure to give him the requisite notice, he ceases to be a party, and becomes a stranger to the instrument.[2]

§ 706. **Party Not Notified Not Immediately Discharged.** Nevertheless, the indorser who has not been notified of the dishonor of the paper upon which he is liable, is not, *ipso facto*, discharged, as appears to be assumed in the supposititious case stated by Judge Story.[3] He must not only, in order to be discharged, not have received notice of the dishonor, but the time must have elapsed within which he could have been legally notified. Until then his contingent liability continues, and, according to the rule laid down by Lord Denman,[4] as well as numerous English and American decisions made in pursuance thereof, he may give notice to all prior parties, and bind them as effectually as though he had been the holder at the time of dishonor, or had been duly notified previous to his giving notice to prior parties.[5]

§ 707. **Doctrine Declared by Chitty.**— In his valuable work on Bills of Exchange, Mr. Chitty deduces from the authorities the rule that the notice will be by the proper person if given by any person who is a party to the bill, and

[1] Lord Ellenborough, in Stewart *v.* Kennett, 2 Camp., 177; Hopes *v.* Alder, 6 East, 16; Stanton *v.* Blossom, 14 Mass., 116.

[2] 2 Daniel on Negot. Inst., 42.

[3] *Supra*, § 704.

[4] Chapman *v.* Keane, *supra*, § 703.

[5] Riddle *v.* Mandeville, 5 Cranch, 322; Crocker *v.* Getchell, 23 Me., 392; Stafford *v.* Yates, 18 Johns., 327; Glasgow *v.* Pratte, 8 Mo., 336; Glasscock *v.* Bank of Mo., id., 443; Batchelor *v.* Priest, 12 Pick., 399.

who would be entitled to reimbursement after paying the same; and the object of the notice being to enable the parties to have recourse to the maker, acceptor or drawer, it makes no difference from which one of the parties the notice is received, it will inure to the benefit of all antecedent parties, and render any further notice from them unnecessary.[1] The same view is taken by Mr. Thompson,[2] by whom it is regarded as settled that notice from any party to the bill will be sufficient if it conforms in other respects to the requirements of the law, and when given by the last indorser to the first, or to the drawer, will inure to the benefit of all intermediate parties.[3]

§ 708. Notice Given by Party Before Received.—Where an indorser notifies prior parties before he has himself received formal notice, the later authorities seem to regard his action as a virtual waiver of formal notice, or an acknowledgment of his own liability, and consequently, should the notice never afterwards be given him, this will not affect the liability of any prior party to whom he gave notice before the expiration of the time within which he should have been notified of the dishonor. The notice being from a proper party fixes the liability of the party to whom it is given, and he can only be released by the voluntary act of each of the parties to whom he is liable. It will not be contended, however, that any party to negotiable paper who has been discharged for the want of notice can, by subsequent waiver, reassume his liability on the instrument so as to affect antecedent parties with notice which he gives after his own discharge.[4]

§ 709. General Acceptance of the Above Doctrine.—Notwithstanding the modifications by which some of the

[1] Chitty on Bills, 227.

[2] Thompson on Bills, sec. IV, p. 496.

[3] See, also, 2 Daniel on Negot. Inst., § 987; Stafford *v.* Yates, 18 Johns., 327; Batchelor *v.* Priest, 12 Pick., 406; Stanton *v.* Blossom, 14 Mass., 116; Renshaw *v.* Triplett, 23 Mo., 213; Swayze *v.* Britton, 17 Kans., 627.

[4] See *post*, § 776 *et seq.*

earlier English and American authorities have sought to restrict the application of the doctrine, that any party to a note or bill may give the notice by which an antecedent party may be held liable to subsequent parties, the English cases by which the doctrine was first laid down have been followed in both countries, until it has become quite firmly established.[1]

§ 710. **Notice by Acceptor.**— Following these authorities, it has been decided that where a bill of exchange was dishonored when presented for payment, notice of such dishonor, given by the acceptor, would bind the prior parties to whom the same was given, as effectually as though it had come from the holder, or a subsequent indorser, although, in the same case, the principle was fully recognized that notice from a mere stranger would not be sufficient.[2]

§ 711. **By Acceptor Supra Protest.**— So, in the case of Union Bank *v.* Grimshaw,[3] where the acceptor, on the day the bills matured, addressed a letter to the drawer informing him that they must go back protested, this was held sufficient notice to bind the drawer, and would inure to the benefit of any subsequent party who sought to avail himself of it. So, also, in the case of Konig *v.* Bayard,[4] Chief Justice Marshall recognized the validity of notice from an acceptor, *supra protest.*

§ 712. **By Drawee of Bill.**— Upon the same principle as the foregoing, it was held, in Mt. Pleasant Bank *v.* McLeran,[5] that where the bill was not accepted, notice from the drawee would be as effectual as from a party liable to pay the same, and entitled to reimbursement from the prior party notified. This case, however, involved the further question of *agency* in the party giving the notice, though such notice might

[1] See cases cited *infra;* Butler *v.* Duval, 4 Yerg., 265; Bank of United States *v.* Goddard, 5 Mason, 366.

[2] Brailsford *v.* Williams, 15 Md., 150; Rosher *v.* Kieran, 4 Camp., 87.

[3] 15 La., 321.

[4] 1 Pet., 250.

[5] 26 Iowa, 306.

well have been held good without it appearing that the drawee, from whom it came, acted as the agent of the holder, for whose benefit such notice was given.

§ 713. **By Maker of Note.**— It was also decided, in the case of Glasgow *v.* Pratte,[1] which is cited with evident approval in First National Bank *v.* Ryerson,[2] that where a negotiable promissory note was dishonored, the maker could give notice thereof so as to bind *prior* indorsers, and render them liable to *subsequent* parties to the instrument.

§ 714. **By an Agent.**— A notice given by the agent of any party to the bill or note will be as effectual as if given by the party himself.[3] And such agent need not have been empowered expressly for the purpose of giving such notice. Where the instrument has been intrusted to a banking institution for collection, the notice of dishonor may be given by the bank, or any of its officers.[4] And this principle has been carried to the extent of imposing the giving of notice of dishonor upon such banks, as a duty implied from the nature of the undertaking on their part to collect. For non-feasance in this particular, the holder has been held entitled to maintain *assumpsit* against the bank.[5]

§ 715. **By Agent for Collection, or by Notary.**— Any agent authorized to demand payment may give the notice, whether such agent be authorized and empowered thereto by written letter of attorney or by verbal appointment.[6] The notary in whose hands the instrument has been placed for presentment or demand, and with authority to formally

[1] 8 Mo., 336.

[2] 23 Ia., 508.

[3] Copperthwaite *v.* Sheffield, 1 Sanf., 416; Hazlett *v.* Poultney, 1 Nott & M., 466; Tunno *v.* Lague, 2 Johns. Cas., 1; Bank of Cape Fear *v.* Seawell, 2 Hawks (N. C.), 560; Mead *v.* Engs, 5 Cow., 303; Payne *v.* Patrick, 21 Tex., 680; Greene *v.* Farley, 20 Ala., 322; Bank of State *v.* Vaughan, 36 Mo., 90.

[4] Freeman's Bank *v.* Perkins, 18 Me., 292; Worden *v.* Nourse, 36 Vt., 756.

[5] Smedes *v.* Utica Bank, 20 Johns., 372.

[6] Sussex Bank *v.* Baldwin, 17 N. J. L., 487.

protest the same in case of dishonor, is such a holder of the paper as may give the notice, whether the instrument is one requiring formal protest or not.[1]

§ 716. **Holder, to Give Notice, Need Not be Owner.**— Even where it is required that the notice shall come from the holder, it is not necessary that he shall be the owner of the paper dishonored. Where he is merely a holder for collection, as we have seen, he may not only give notice to antecedent parties, but it becomes his duty to do so, and the same degree of diligence is demanded of him as though he were a holder for value.[2] And it is equally incumbent upon such agent to give due and timely notice to his principal of the default of payment or failure to accept, as it would be upon one holder for value to give notice to another. The agent or holder for collection has the same time within which to give notice to the real holder, as to any other party antecedently liable.[3]

§ 717. **By Successive Agents, to Each Other.**— As the notice may be transmitted from the holder, through the several indorsers, in the inverse order of their indorsements, back to the drawer, and each of said parties is entitled to the same time, and may employ the same means, and give the notice in the same manner and mode as it may be given by the holder, however circuitous such a course of transmission may be, and however much time may be needlessly consumed by such course;[4] so, where the paper is sent for collection to several banks in succession, each may give notice of dishonor to the antecedent bank from which it was

[1] Bank of Utica *v.* Smith, 18 Johns., 230; Fulton *v.* Maccracken, 18 Md., 528; Rennick *v.* Robbins, 28 Mo., 339; Burke *v.* McKay, 2 How. (U. S.), 66; Church *v.* Barlow, 9 Pick., 547; Howard *v.* Ives, 1 Hill, 263.

[2] Bartlett *v.* Isbell, 31 Conn., 296.

[3] Lawson *v.* Farmers' Bank, 1 Ohio St., 206; Scott *v.* Lifford, 9 East, 347; Langdale *v.* Trimmer, 15 id., 291.

[4] Triplett *v.* Hunt, 3 Dana, 126; Renshaw *v.* Triplett, 23 Mo., 213; Whitman *v.* Farmers' Bank, 8 Porter (Ala.), 258; Ogden *v.* Dobbin, 2 Hall, 112; McNeill *v.* Wyatt, 3 Humph., 125; Hill *v.* Planters' Bank, id., 670; Eagle Bank *v.* Hathaway, 5 Met., 212.

received, and so on, in like manner, and with the same effect, as they might were they holders for value.[1]

§ 718. Signing Wrong Name Will Not Affect Notice from Proper Party.— Mere error in giving the name of the principal, by whose authority the agent acts in notifying the party, will not vitiate the notice. As where the plaintiff, who was the actual holder of the instrument when it was dishonored, gave directions to his attorney to notify defendant, who was a prior indorser, in the name of the last indorser, and the attorney accordingly addressed a letter to the defendant, in which he used this language: "I am instructed by Mr. B. (the indorser) to give you notice," etc., signing the letter with his own name, the notice was held good, as coming from the real holder.[2]

§ 719. Otherwise Where Attorney Has No Authority by Party Whose Name is Used.— However, in Harrison *v.* Ruscoe,[3] where the attorney gave notice to a prior indorser, but stated therein, by mistake, that he was instructed to do so by one from whom he had no authority whatever, either to demand payment or to give notice, it was held that, although this mistake would not vitiate the notice altogether, it would, nevertheless, have the effect of changing the *status* of the party by whose authority the notice was in fact given, so that he would occupy the same position towards the party notified as would have been occupied by the party from whom the notice purported to come, had he authorized it; and any defense which would have been available against such party, in favor of the one receiving the notice, would be equally good against the party at whose instance the notice was given.

§ 720. Authority to Give Notice Implied.— Where a bill of exchange is placed in the hands of an attorney or agent, with authority to present the same for acceptance, the authority to give notice of a failure or refusal to accept is

[1] Clode *v.* Bayley, 12 M. & W., 51.
[2] Rogerson *v.* Hare, W., W. & D., 65.
[3] 15 M. & W., 231.

implied from the authority to present, and it has been held that such notice may be given by the attorney or agent in his own name.[1]

§ 721. **Holder as Security May Give Notice.**— It is not even essential to the right of a holder of negotiable paper that he should be a holder for the purpose of collection or presentment. One who holds the instrument as collateral security for a debt, not only may, but properly should, give notice of its dishonor, so as to preserve the rights of his debtor against antecedent parties.[2]

§ 722. **Notice from Stranger Adopted by Holder.**— The rule that notice from a mere stranger to the instrument will not be binding upon the parties to whom it is given, is considerably weakened by the liberal manner in which the courts seem inclined to construe the authority of agents by whom notice of dishonor is frequently given. It has been held, even where the person giving the notice was a total stranger to the bill, but who represented that he was the real holder, that such notice was rendered valid and binding upon the parties to whom the same was given, by the real holder's subsequent ratification of the acts of the pretended holder.[3] A case can hardly be imagined where the circumstances attending the act of intermeddling by the self-styled holder, or a pretended agent, would be resented by the refusal of the party so signally benefited to adopt the act which was necessary to save him from pecuniary loss.

§ 723. **Party Giving Notice May Have No Knowledge at Time.**— It is of no consequence, as affecting the rights of the parties, that the person giving the notice has not, at the time, either knowledge or information of the fact that the paper has been dishonored. If the language of the notice is sufficiently positive and certain, and its statements are borne out by subsequent developments, it matters not *how* the person sending the notice gained the knowledge

[1] Woodthorpe *v.* Lawes, 2 M. & W., 109.
[2] Peacock *v.* Purcel, 14 C. B., N. S., 728.
[3] Lysaght *v.* Bryant, 2 Carr. & Kir., 1016.

imparted by the notice, nor whether he knew it at all. This doctrine is fairly illustrated by the case of Jennings *v.* Roberts.[1] Here the bill had been indorsed by defendant to plaintiff, and by the latter to a country bank. It was accepted, and payable in London. On the day it fell due, plaintiff saw the manager of the country bank, by whom he was informed that the bill would be back from London in the morning. On the same day, this information was communicated by plaintiff to defendant, with a demand for the money to meet it. Subsequently it transpired that the manager did not know, at the time of giving the information, that the bill had been dishonored; but such proving to be the case, and the bill being returned on the following day, it was held that his want of knowledge did not vitiate the notice, so long as the fact communicated proved true.

§ 724. **Notice by Executor.**— In case of the death of the holder, or other party from whom the notice should emanate, it should be given by his executor or administrator within a reasonable time after appointment, in case of the latter.[2] But where one of several joint owners dies, the notice should be given by a survivor or his agent.[3]

§ 725. **By Assignee in Bankruptcy.**— Where the holder has been declared bankrupt, the notice should primarily be given by the assignee. If it falls due subsequent to the assignment, the assignee will be governed by the same rules as to time as parties holding in their own right; but if it is dishonored before it comes to his hands, he would probably be allowed a reasonable time after the assignment within which to give notice.

§ 726. **When by the Bankrupt.**— As the bankrupt holder stands in privity with the assignee, has an interest in the note or bill, and represents the interests of his own estate until the selection or appointment of an assignee, notice

[1] 29 Eng. L. & Eq., 118.
[2] White *v.* Stoddard, 11 Gray, 258; Story on Prom. Notes, § 304.
[3] Evans *v.* Evans, 9 Paige, 178.

from the bankrupt, prior to such appointment, and probably prior to the *assignment*, would be valid.[1]

§ 727. **By Guardian or Ward.**—If the holder be an infant, or other person under guardianship, notice from either guardian or ward would be sufficient.

§ 728. **By Married Woman.**— Where the holder is a *feme sole* at the inception of the instrument, but marries before its maturity, notice of dishonor should be given by her husband, or by her, with his consent, express or implied; but notice sent by her would probably be available without direct proof of consent on the part of the husband, even where the common law disabilities of married women still prevail.[2] And where the note is given to a *feme covert*, the rule will probably be the same in regard to notice.[3]

[1] Story on Prom. Notes, § 305.

[2] Burrough *v.* Moss, 10 B. & C., 558; McNeilage *v.* Halloway, 1 B. & Ald., 218; Chitty on Bills, 23, 24, 26.

[3] Philliskirk *v.* Pluckwell, 2 M. & S., 393.

II. To Whom Given.

§ 729. To Drawers and Indorsers — Reason for Rule.
730. Drawer of Bill.
731. Should Not be Waived by Agent.
732. When Not Entitled to Notice.
733. Drawn Upon Partnership by Member of Firm.
734. Indorser.
735. Need Not be Indorser for Value.
736. May be from Any Subsequent Party.
737. Notice of Partial Dishonor.
738. Indorsers of Over-due Paper.
739. Illustration of Above.
740. Paper Re-issued by Indorser.
741. Purchase at Indorser's Request — Notice Unnecessary.
742. Transferrer by Delivery Not Entitled to Notice.
743. Notice to Agent.
744. Example of Authority to Receive Notice.
745. Authority May be Implied.
746. Question of Fact.
747. Agent with General Authority.
748. Appointed Prior to the War.
749. Example Where Authority Not Implied.
750. Not Implied from Authority to Indorse.
751. Notice to Partners.
752. Indorsement During Partnership.
753. After Dissolution.
754. To Agent of One of the Partners.
755. To Surviving Partner.
756. Exception as to Partners — Manner of Service.
757. Joint Indorsers Not Parties.
758. Agency Not Implied from Joint Indorsement.
759. Consequences of Failure to Notify Both Joint Indorsers.
760. Assumption of Authority by One, for All, Binds Him.
761. Circumstances Admitting Notice to Joint Indorsers.
762. Joint Administrators Cannot Tie Their Hands.
763. Notice to Personal Representatives.
764. How Notified by Letter.
765. Sufficient When Addressed to Deceased Indorser.
766. Left at Last Dwelling-place of Deceased.
767. Addressed to Indorser Known to be Dead.
768. To One of Several Personal Representatives.
769. To Assignee in Bankruptcy or to Bankrupt.
770. Before Selection of Assignee.

§ 771. Bankruptcy of Acceptor No Excuse.
772. Might be to Bankrupt After Assignment.
773. To Infant Party.
774. Married Woman.
775. Drawer or Indorser Insane.

§ 729. To Drawers and Indorsers — Reason for the Rule.— The parties who are entitled to notice of the dishonor of a bill or note may be classed under the general description of *all those who have become liable thereon, either as drawers or indorsers.* One of the reasons why they are entitled to such notice is, that it is implied as a condition of their undertaking. The other is, that upon paying and taking up the dishonored instrument, they will be entitled to reimbursement at the hands of those antecedently liable. The right which the drawer or indorser has, when there has been a default of payment by the drawer of a bill or the maker of a note, to discharge his own liability to subsequent parties by payment and resort to prior parties, is one which the law merchant guards by requiring that he shall receive prompt notice of the happening of the event which may change the nature of his contingent liability to that which is certain and fixed. The most efficacious method of securing this notice is that adopted by the law, of discharging from liability on the instrument all such parties to whom it is not given in due time.[1]

§ 730. Drawer of Bill.— Where a bill of exchange is drawn in good faith, upon the custodian of funds of the drawer, or against a party who has authorized the draft, or who rests under legal obligation to honor it, the drawer has not only a right, as against the drawee, to have the same paid, but as he has undertaken to answer to any subsequent party that it will be so paid; and while the bill is on the market, he treats it as an adjustment *pro tanto* of accounts between the drawee and himself, he has an equal right, as against the holder at maturity, to prompt information, in case payment is refused. And what may be said of pay-

[1] See cases cited *infra.*

ment is equally true of acceptance, where the bill is so drawn as to require presentment for that purpose.[1]

§ 731. Should Not be Waived by Agent.— The case of Grosvenor *v.* Stone[2] illustrates the importance of a punctilious insistence upon this right. Plaintiff drew a bill upon a banker who had authorized the draft for the benefit of defendant. The bill was accepted by the drawer, with funds in his hands to meet it. After acceptance and before the maturity of the bill, the acceptor became bankrupt, and the bill was, through mistake, paid for the honor of one not a party thereto. There was a failure to give notice of dishonor to plaintiff, who nevertheless allowed judgment to go against him by default, and then sought to hold defendant, for whose use the draft was drawn. It was held that the circumstances under which the bill was drawn entitled plaintiff to notice of its dishonor, and though he acted as defendant's agent in the transaction, he should not have waived his right to notice, to the prejudice of his principal, and hence could not recover.

§ 732. When Not Entitled to Notice.— Where, however, the drawer has no good reason to believe that the draft will be honored, as when he knows there are no funds in the hands of the drawee, who is under no obligation to pay, or where he has himself intercepted the funds remitted for that purpose;[3] or where the maker has made an assignment of all his property to the indorser;[4] or the indorser has otherwise received full indemnity from the maker or acceptor;[5] or the drawer knows when he draws the bill that the drawee is bankrupt, he is not entitled to notice from either holder or indorser.[6]

[1] Grosvenor *v.* Stone, 8 Pick., 79.

[2] 8 Pick., 79.

[3] Miser *v.* Trovinger, 7 Ohio St., 281; Commercial Bank *v.* Hughes, 17 Wend., 94.

[4] Bond *v.* Farnham, 5 Mass., 170; Barton *v.* Baker, 1 S. & R., 334; Mechanics' Bank *v.* Griswold, 7 Wend., 165.

[5] Rhett *v.* Poe, 2 How. (U. S.), 457.

[6] Durham *v.* Price, 5 Yerg., 300.

§ 733. **Drawn Upon Partnership by Member of Firm.**— It has also been held, where the bill was drawn upon a partnership by one of the partners, that, as each member was presumed to have full knowledge of whatever concerned the partnership affairs, and the drawer could have no action at law against his copartners upon the dishonored bill, he was not entitled to notice.[1]

§ 734. **Indorser.**— For the same reasons that operate in favor of the drawer of a bill of exchange, an indorser of a bill or note, who has passed the instrument by an unqualified indorsement, is also entitled to notice of its dishonor, and upon failure of notice is released from liability to subsequent parties.[2]

§ 735. **Need Not be Indorser for Value.**— This right exists in favor of each indorser of a negotiable instrument, who has a right to resort to antecedent parties, whether they be indorsers for value or have merely received and transferred by indorsement the bill or note to a subsequent party for collection.[3]

§ 736. **May be from Any Subsequent Party.**— But this right to notice does not exist in every instance in favor of any party, as against any particular subsequent party, except the holder. The drawer of a bill, or the first of any number of indorsers of a bill or note, may be bound by notice directly from the holder, although all intermediate parties are discharged for the want of notice.[4] The manifest reason of this is that no one can have any interest in fixing the liability of subsequent parties, while each is interested in seeing that antecedent parties are not discharged. The general and most prudent course, however, is for the

[1] Fuller *v.* Hooper, 3 Gray, 334; Gowen *v.* Jackson, 20 Johns., 176.

[2] *Infra*, § 735 *et seq.*

[3] McNeill *v.* Wyatt, 3 Humph., 125; Scott *v.* Lifford, 9 East, 347; Butler *v.* Duval, 4 Yerg., 265; Clode *v.* Bayley, 12 M. & W., 51; Seaton *v.* Scovill, 18 Kan., 435; Thillman *v.* Gueble, 32 La. An., 260; Braley *v.* Buchanan, 21 Kan., 555.

[4] 2 Daniel on Negot. Inst., § 995; Cardwell *v.* Allen, 33 Gratt., 157.

party giving the notice, to notify all the prior parties whose residences or places of business are known to him.[1]

§ 737. **Notice of Partial Dishonor.**—It does not always follow that an indorser is completely discharged from liability, where, from failure of notice of partial dishonor of a negotiable note bearing his indorsement, he is partially discharged. As where the note was payable by instalments, falling due at different periods, it was held that the notice should have been given upon failure to pay each instalment, at the time it fell due, precisely in the same manner as though the several sums were evidenced by separate notes. Notice being given of the failure to pay the final instalment, this was held sufficient to fix the indorser's liability *pro tanto*, though he was clearly discharged with respect to those of the dishonor of which no notice had been given.[2]

§ 738. **Indorser of Over-due Paper.**— The authorities are not in perfect accord as to the right of an indorser of negotiable paper which, at the time of indorsement, was past due, to notice. The doctrine is announced in Gray *v.* Bell[3] and Van Hoesen *v.* Van Alstyne,[4] that indorsers of over-due paper are not entitled to notice of its dishonor, beyond such as would arise from the bringing of a suit within a reasonable time, which might extend to several months. In the latter case three months was regarded as a reasonable time. But notwithstanding the views expressed in these two cases, the current of authority seems to be decidedly against the exception therein contended for. Indorsers after maturity, as well as indorsers of paper due at sight or on demand, sustain the same relations to each other, and to other parties, in regard to the matter of notice, as indorsers of time paper, before maturity, with the single

[1] Hutz *v.* Karthause, 4 Wash. C. Ct., 1; Williams *v.* Bank of United States, 2 Pet., 96.

[2] Eastman *v.* Turman, 24 Cal., 379.

[3] 3 Rich., 71.

[4] 3 Wend., 75.

exception that they have a right to insist upon the exercise of diligence on the part of the holder in demanding payment. Such indorsement is regarded as equivalent to drawing a new bill, or making a new note, payable at sight or on demand.[1]

§ 739. **Illustration of Above.**— In rendering the opinion of the court in Colt *v.* Barnard,[2] where the note had been negotiated subsequent to its dishonor, Shaw, C. J., uses the following language: "If the indorser is liable at all on such indorsement, it is in virtue of the law merchant, which creates a conditional liability to pay, if the maker, on presentment, shall neglect or refuse to pay, and seasonable notice of such dishonor is given to the indorser. It is very clear that a promissory note is negotiable after it falls due, as well as before. Each indorsement is in the nature of a new draft, by which the holder orders the maker to pay the contents to the indorsee. * * * All the reasons which require a demand and notice, in any case, to charge the indorser, apply to this. There is the same reason for prompt notice, namely, that the indorser may take measures to secure payment if the note is dishonored on presentment."[3]

§ 740. **Paper Re-issued by Indorser.**— However, where a party has paid and taken up the instrument upon which he was liable as indorser after maturity, and his liability,

[1] Light *v.* Kingsbury, 50 Mo., 331; Thompson *v.* Williams, 14 Cal., 160; Bebee *v.* Brooks, 12 id., 308; Jones *v.* Middleton, 29 Ia., 188; McKewer *v.* Kirtland, 33 Ia., 348; Colt *v.* Barnard, 18 Pick., 260; Greely *v.* Hunt, 21 Me., 455; Bishop *v.* Dexter, 2 Conn., 419; Berry *v.* Robinson, 9 Johns., 121; Branch Bank *v.* Gafney, 9 Ala., 153; Hart *v.* Eastman, 7 Minn., 74; Leavitt *v.* Putnam, 3 N. Y., 494; Lockwood *v.* Crawford, 18 Conn., 361; Dwight *v.* Emerson, 2 N. H., 159; Kirkpatrick *v.* McCullough, 3 Humph., 171; Adams *v.* Torbet, 6 Ala., 865; Atwood *v.* Hazelton, 3 Bailey (S. C.), 457; Course *v.* Shackleford, 2 Nott & McC., 283; Shelby *v.* Judd, 24 Kan., 161; Sawyer *v.* Brownell, 13 R. I., 141; Bemis *v.* McKenzie, 13 Fla., 557; Graul *v.* Strutzel, 53 Ia., 712.

[2] 18 Pick., 260.

[3] McKinney *v.* Crawford, 8 S. & R., 351; Rugely *v.* Davidson, 2 Mills' Const. R., 33; Moody *v.* Mack, 43 Mo., 210; Davis *v.* Francisco, 11 id., 572.

as well as that of other parties, has been fixed by due notice of dishonor, and he re-issues the paper, he will not be entitled to notice of a subsequent dishonor.[1] The reason for this distinction is that the indorser's conditional liability grows out of his contract of indorsement, and not out of the re-issue of the instrument. His liability as indorser was fixed by notice of the first default of payment, and notice of demand and non-payment, after he had again put the paper in circulation, would be as useless as notice to the maker of a promissory note.

§ 741. **Purchase at Indorser's Request — Notice Unnecessary.**— So where the indorser, subsequent to the dishonor of the note, persuaded the holder to purchase it, notice of the subsequent dishonor was held to be unnecessary, as the purchaser had a right to infer, from the interest manifested by the indorser, that his liability had already been fixed by notice.[2]

§ 742. **Transferrer by Delivery Not Entitled to Notice.** It is not enough to entitle one to notice of the dishonor of commercial paper, as an indorser, that the instrument dishonored has passed through his hands, and, by reason of its non-payment, he has been called upon to reimburse his transferee. He may have transferred the paper by mere delivery, and bound himself, by an independent contract, to answer for its prompt payment. To be entitled to notice, the party transferring negotiable paper must do so *by regular indorsement*, so that all subsequent parties may be informed of the interest he has in its ultimate fate.[3]

§ 743. **Notice to Agent.**— Notice of dishonor may be given to an *agent* of the party to be charged, in the same manner, and with like effect, as it may be given to the party

[1] St. John *v.* Roberts, 31 N. Y., 441; Williams *v.* Matthews, 3 Cow., 252; Libby *v.* Pierce, 47 N. H., 314; 2 Dan. on Negot. Inst., § 997. But see Montgomery, etc., R. R. Co. *v.* Trebles, 44 Ala., 255, where this doctrine seems to be doubted.

[2] Libby *v.* Pierce, 47 N. H., 309.

[3] Van Wart *v.* Woolley, 3 Barn. & Cres., 439.

in person, provided the authority of the agent extends to the receipt of notices of this sort.[1]

§ 744. **Example of Authority to Receive Notice.**— Where R., by letter of attorney, constituted F. his agent and attorney, general and special, with full powers for and in the name of his principal, or in his own name and for his own use, to make, indorse, draw, accept and negotiate bills, notes, etc., the letter stating, in conclusion, "that it was to be taken and understood in its fullest and most comprehensive sense and meaning," and F. made his own note, payable in bank, and indorsed it in the name of his principal, this letter of attorney was held to authorize the attorney to receive notice of the dishonor of the note so indorsed, so as to fix his principal's liability to the holder or subsequent indorser.[2]

§ 745. **Authority May be Implied.**— In order to render notice, served upon an agent, valid and binding as notice to the principal, it is not essential that the agency should be created by letter of attorney. The authority of the agent may be *implied* as well as *express*. And if the circumstances are such as to warrant the implication that the relation of principal and agent subsists between the party entitled to notice, and the one to whom it is given, it will operate as effectually to charge the principal as though the agent had been expressly authorized.[3]

§ 746. **Question of Fact.**— In Wilkins *v.* Commercial Bank,[4] the agent, whose power of attorney had expired by limitation, was still in the habit of receiving letters addressed to his principal, who called at the office of the agent for his mail. Notice of dishonor of a bill of which the principal

[1] See ch. IX, sec. 674, part II, Notice to an Agent; also, cases cited *infra;* Wilkins *v.* Commercial Bank, 6 How. (Miss.), 217; Fassin *v.* Hubbard, 55 N. Y., 471; Cross *v.* Smith, 1 M. & Sel., 545.

[2] Wilcox *v.* Routh, 9 Sm. & Marsh., 476; Smith *v.* Thatcher, 4 B. & Ald., 200.

[3] Wilkins *v.* Commercial Bank, 6 How. (Miss.), 217; Hesters *v.* Petrovic, 1 Rob. (La.), 119; Wilson's Executrix *v.* Senier, 14 Wis., 380.

[4] 6 How. (Miss.), 217.

was an indorser was left for him at the office of the agent, as usual. The agent had no recollection of either receiving the notice or delivering it to his principal. Under these circumstances it was held that the implication of agency was a question of fact for the jury, and if found to exist, the notice so served was sufficient to bind the principal.

§ 747. **Agent with General Authority.**— So, in Hesters *v.* Petrovic,[1] where the indorser was absent from home, and had left an agent in charge of his plantation, with authority to collect for him and furnish all necessary supplies for his plantation, the notice of dishonor being served upon such agent, was held sufficient to bind the principal.

§ 748. **Appointed Prior to the War.**— Notwithstanding the interruptions of commercial relations which follow the outbreak of a war, and which prevent the citizens or subjects of one of the belligerents from carrying on business, either by themselves or their agents, within the territory of the other belligerent, it is a well recognized doctrine in such cases that agents appointed prior to the war may act so as to bind their principals after the commencement of hostilities.[2] It was accordingly held, where an agent was constituted prior to the late civil war in this country, with authority to receive notice of the dishonor of commercial paper indorsed by his principal, that notice might be effectually served upon such agent after the commencement of hostilities, though his principal was then domiciled within the enemies' lines.[3]

§ 749. **Example Where Authority Not Implied.**—Nevertheless, it is not every species of agency that will authorize the service of notice of the dishonor of commercial paper on the agent, for the purpose of fixing the liability

[1] 1 Rob. (La.), 119.

[2] Buchanan *v.* Curry, 19 Johns., 137; U. S. *v.* Grossmayer, 9 Wall., 72; Ward *v.* Smith, 7 Wall., 447; Conn *v.* Penn, 1 Pet. C. Ct., 496; Denniston *v.* Imbrie, 3 Wash. C. Ct., 396; Paul *v.* Christie, 4 Harris & McH., 161; Robinson *v.* Int. Life As. Soc., 42 N. Y., 54.

[3] Hubbard *v.* Matthews, 54 N. Y., 43.

of the principal as indorser. The agent may have extensive powers under a letter of attorney, and still not be the proper person to receive notice of the dishonor of a bill or note. As where one held a letter of attorney from one of the stockholders of a bank authorizing him to receive and sign receipts for all dividends on his stock, to vote as his proxy, to deposit money in said institution, and draw checks, to lodge promissory notes, and to sign acceptances of bills of exchange for his principal; this extensive grant of powers would seem to be sufficiently comprehensive to include everything essential to the credit of the principal in dealing with negotiable instruments; but it was held that the power conferred was *special*, and did not include, either expressly or by implication, authority to receive notice of the dishonor of commercial paper, upon which the principal was liable as indorser; hence, notice given to such attorney would not bind his principal.[1]

§ 750. Not Implied from Authority to Indorse.— So it was held, where the agent was duly authorized and empowered to indorse for the principal, that this did not imply authority in such agent to accept notice of dishonor, even of a bill or note, indorsed pursuant to such authority;[2] but this case can hardly be followed, so long as we admit that the authorization of the agent may be *implied* as well as *express*. If the notice of dishonor might not be given to the agent who indorsed the instrument, without further inquiry as to his authority to accept notice, it is difficult to imagine a case where this power is not expressly granted, that would admit of the principal's being bound by notice given to his agent.

§ 751. Notice to Partners.— Where the bill or note is drawn or indorsed by two or more persons who are engaged in business as partners, and the draft or indorsement is made by them acting in their partnership capacity, they

[1] Louisiana St. Bank *v.* Ellery, 4 Mart., N. S. (La.), 87.

[2] Valk *v.* Gaillard, 4 Strob. (S. C.), 99. See, also, Wilcox *v.* Routh, 9 Sm. & Marsh., 476.

thereby become jointly and severally liable, as upon other partnership contracts, and a notice of non-acceptance or non-payment, served upon either, will be sufficient to bind them both.[1]

§ 752. **Indorsement During Partnership.**— In order that the liability of both partners may be fixed by a notice served upon one of them, it is essential that the draft or indorsement should have been made during the continuance of the copartnership, or at least in connection with the partnership business; but it is not necessary that the partnership relation should continue until the maturity and dishonor of the instrument and the service of the notice.[2]

§ 753. **After Dissolution.**— So a partnership has been held bound by such notice after dissolution, when it was dissolved by the outbreak of the civil war, and one of the members of the late firm was, at the time the notice was given, living within a hostile state.[3]

§ 754. **To Agent of One of the Partners.**— It has been held, also, where a dissolution of partnership took place after the partners had indorsed a note, that notice of its subsequent dishonor might be given to the agent of one of them.[4]

§ 755. **To Surviving Partner.**— So, also, where one of the partners died after the obligation was incurred, it was held that notice to the surviving partner would bind the personal representatives of the deceased.[5]

[1] Gowan *v.* Jackson, 20 Johns., 175; Porthouse *v.* Parker, 1 Camp., 82; Story on B., §§ 299, 305; Story on Prom. Notes, § 308; People's Bank *v.* Keech, 26 Md., 521; Fourth National Bank *v.* Heuschen, 52 Mo., 207; Brown *v.* Turner, 15 Ala., N. S., 832; Hubbard *v.* Matthews, 54 N. Y., 50; Slocomb *v.* Lizardi, 21 La. An., 355.

[2] Coster *v.* Thomason, 19 Ala., N. S., 717; Slocomb *v.* Lizardi, 21 La. An., 355; Griswold *v.* Waddington, 16 id., 484; Clarke *v.* Morey, 10 Johns., 69; Fourth National Bank *v.* Heuschen, 52 Mo., 209.

[3] Hubbard *v.* Matthews, 54 N. Y., 43.

[4] Brown *v.* Turner, 15 Ala., N. S., 832.

[5] Dabney *v.* Stidger, 4 Sm. & Marsh., 749.

§ 756. Exception as to Partners — Manner of Service.— In Hume *v.* Watt,[1] an exception is made as to the validity of notice to bind partners when served upon one, and such service was held to bind *neither*, because one of the partners resided in the place where the note was dishonored, and where the party resided who gave the notice. Instead of giving him personal notice, it was sent through the mail to the other partner, who was a non-resident of the place, and it was not received until several days after the time within which it should have been personally served upon the resident partner.[2]

§ 757. Joint Indorsers Not Partners.— Where, however, the joint drawers or indorsers of the bill or note do not sustain towards each other, in the transaction, the relation of partners, the rule is quite different, and the notice of dishonor should be given to *each*, as all are equally entitled to notice.[3]

§ 758. Agency Not Implied from Joint Indorsement.— Where notice has been given to one of such joint indorsers, there is nothing in the nature of the relations existing between them, with respect to the instrument by which they are bound, that will authorize one to accept or waive service of notice for his co-indorser or indorsers, so as to bind them, unless by him or them especially authorized so to do. The mere fact of their having joined in the draft or indorsement will not amount to a presumption or implication of mutual agency, by reason of which one may be bound, in any way, by the acts or admissions of the others.[4]

§ 759. Consequences of Failure to Notify Both Joint Indorsers.— And where the contract of indorsement, or the draft, is *strictly joint* in its nature, the consequences of a

[1] 5 Kan., 34.

[2] See *post*, IV.

[3] Sayre *v.* Frick, 7 W. & S., 383; Bank of U. S. *v.* Beirne, 1 Gratt., 234. *Contra*, see Dodge *v.* Bank of Kentucky, 2 A. K. Marsh., 610.

[4] Shepard *v.* Hawley, 1 Conn., 369; Willis *v.* Green, 5 Hill, 232; Miser *v.* Trovinger, 7 Ohio St., 281.

failure to give notice to one of the joint drawers or indorsers will not be confined to the discharge from liability of the one to whom such notice is not given. Their contract being *joint* and not *several*, the discharge of one would discharge all. So that, not only would the failure of notice release those not notified, but would also discharge those to whom notice was actually given.[1]

§ 760. Assumption of Authority by One, for All, Binds Him.— Nevertheless, circumstances might arise where a joint obligor would not be discharged from liability on such a contract, by a failure to notify some one or more of his co-obligors. As where, upon notice being given to him, he assumed to act for his co-parties, in waiving or accepting notice. Though it is quite clear that if he acted without authority, the others would not be bound, yet it would be supporting him in the perpetration of a fraud, to allow that he might take advantage of the consequences of his own misrepresentation. Even where no fraud was apparent in such transaction, the doctrine that renders a pretended agent personally liable for the contracts entered into without sufficient authority to bind his principal, might be interposed, and the party actually notified held for the entire amount of the dishonored paper, as though he were a several indorser.

§ 761. Circumstances Admitting Notice to Joint Indorsers.— In the case of Willis *v.* Green,[2] where one of two joint indorsers of a note died, and the survivor took from the maker a bond and warrant of attorney, by way of security or indemnity, and had collected thereon nearly the amount of the note, it was held to be an admission that proper steps had been taken to charge both indorsers.

§ 762. Joint Administrators Cannot Tie Their Hands. But, notwithstanding one of such joint parties may by his

[1] People's Bank *v.* Keech, 26 Md., 521; State Bank *v.* Slaughter, 7 Blackf., 133; Bank of Chenango *v.* Root, 4 Cow., 126; Wood *v.* Wood, 16 N. Y., 428.

[2] *Supra*, § 758.

action in the premises estop himself from denying that the proper steps have been taken to fix the liability of all the parties, the personal representatives of a deceased indorser cannot so tie their own hands. It was accordingly held that a subsequent promise by two of three joint administrators of a deceased indorser, to pay the note, where there had been a partial failure of notice, would not operate as a waiver of irregularities calculated to render the service of the notice insufficient.[1]

§ 763. **Notice to Personal Representatives.**— In the event of the death of a drawer or indorser, due notice to his personal representatives will be sufficient; and where the holder has notice of the appointment and qualification of an administrator or executor, when the note or bill is dishonored, such representative is entitled to the same notice as should have been given the indorser or drawer, were he living at the time of dishonor.[2]

§ 764. **How Notified by Letter.**— Where, however, the holder and the representatives of the party to be notified reside in different places, so that notice may properly be transmitted through the mail, and the holder cannot, by the exercise of reasonable diligence, ascertain the names of such representatives, they may be notified by a letter which is not addressed to them by their names. In such a case, or where the administrator of an intestate indorser or drawer has not been appointed, the notice will be sufficient if addressed to "the personal representatives" of deceased.[3]

§ 765. **Sufficient When Addressed to Deceased Indorser.**— So, where the notary in whose hands the note was placed for the purpose of demand, and, in case of default of payment, notice of dishonor, being ignorant of the death

[1] Cayuga County Bank *v.* Bennett, 5 Hill, 236.

[2] Oriental Bank *v.* Blake, 22 Pick., 206; Stewart *v.* Eden, 2 Cai., 121; Massachusetts Bank *v.* Oliver, 10 Cush., 557; Smalley *v.* Wright, 40 N. J. L., 471.

[3] Boyd *v.* Orton, 16 Wis., 495; Boyd *v.* City Savings Bank, 15 Gratt., 501.

of the indorser, addressed the letter containing the notice to such indorser, which notice in due time came to the hands of his personal representatives, the notice was held sufficient to bind the estate of the decedent, as though he had personally received the notice prior to his decease.[1]

§ 766. **Left at Last Dwelling-place of Deceased.**— So, also, where the indorser died at sea ten days prior to the maturity of the note, but his death was unknown to the holder of the note until long after its maturity and dishonor, a notice left at his last dwelling-place in New York could not be impeached for not being given to the proper party.[2]

§ 767. **Addressed to Indorser Known to be Dead.**— And it has been held, where the holder knew of the death of the indorser, but upon diligent inquiry failed to have the names of the personal representatives, that notice sent inclosed in a letter directed to the indorser himself would be sufficient.[3]

§ 768. **To One of Several Personal Representatives.**— Where the notice was sent to one of several personal representatives of a deceased indorser, this was held, under the laws of that state, sufficient notice to bind the estate.[4]

§ 769. **To Assignee in Bankruptcy, or to Bankrupt.**— Where the indorser or drawer becomes bankrupt subsequent to drawing or indorsing the bill or note, the notice should be given to the assignee, where one has been selected, prior to the dishonor of the instrument; but until such assignee has been selected, it would always be safe to notify the bankrupt himself, as he is the only representative of his estate until the assignee is chosen, except in cases where, pending proceedings in bankruptcy, a *receiver* is appointed.[5]

[1] Beals *v.* Peck, 12 Barb., 245; Maspero *v.* Pedesclaux, 22 La. An., 227.

[2] Merchants' Bank *v.* Birch, 17 Johns., 25.

[3] Barnes *v.* Reynolds, 4 How. (Miss.), 114; Goodnow *v.* Warren, 122 Mass., 82; Linderman *v.* Guldin, 34 Pa. St., 54.

[4] Lewis *v.* Bakewell, 6 La. An., 359; Carolina Nat. Bank *v.* Wallace, 13 S. C., 347; Beals *v.* Peck, 12 Barb., 245.

[5] *Ex parte* Moline, 19 Ves. Ch., 216.

§ 770. **Before Selection of Assignee.**— In *Ex parte* Moline,[1] the holder of the note appeared at the second public meeting, under the commission, and the instrument having been dishonored subsequent to the commission, notice of such dishonor was given before the selection of an assignee, and such notice was held sufficient upon the grounds already stated.

§ 771. **Bankruptcy of Acceptor No Excuse.**— Where both drawer and acceptor were declared bankrupt before the maturity of the bill, and the holder had timely notice of the appointment of assignees, it was held that notice should have been given either to the drawer or his assignees of the demand and refusal of payment at maturity. There being no notice given to either, although the drawer's place of business was open, and in charge of a messenger, and there being no excuse for failure of notice except the bankruptcy of the acceptors, the bill was not allowed to be proved under the commission issued against the drawer.[2]

§ 772. **Might be to Bankrupt After Assignment.**— It has been asserted by high authority,[3] that, even after the assignment, notice may be effectually given to antecedent parties by a bankrupt indorser, for the reason that he still has an interest in the bill or note, and will be benefited by shifting the duty of payment upon those who are antecedently liable on the instrument. By a parity of reasoning, we might say, that as the bankrupt drawer or indorser has an interest in securing reimbursement for the benefit of his estate, notice should be given *to* him, or at least *might* be given him and thereby charge his estate.

§ 773. **To Infant Party.**— Where the indorser or drawer is an *infant*, he is entitled to notice of the dishonor of the instrument, and it should be given him, precisely as though he were of full age. He may not choose to plead the disability of infancy in defense, and if it be waived by him, it

[1] *Supra*, § 769.
[2] Rhode *v.* Proctor, 4 Barn. & Cres., 517.
[3] Story on Prom. Notes, § 305.

cannot be interposed by antecedent parties who receive notice of the dishonor through him.[1]

§ 774. **Married Woman.**— Where the draft or indorsement is made by a *feme sole*, who, previous to the maturity of the instrument drawn or indorsed, marries, in case of default of acceptance or payment, notice thereof should, in general, be given to her husband.[2] The exceptions to this would probably be where the indebtedness was a charge upon her separate estate in equity, or where, by statute, married women are held personally liable on their contracts, whether entered into before or after marriage.

§ 775. **Drawer or Indorser Insane.**— Should the drawer or indorser become insane, or otherwise incapable of managing his own affairs, subsequent to incurring the conditional liability and previous to the maturity of the instrument, so that the appointment of a guardian becomes necessary, in the event of the instrument's being dishonored at maturity, notice thereof should be given to such guardian.[3]

[1] Story on Prom. Notes § 311.
[2] *Ibid.*
[3] *Ibid.*

III. Time of Giving Notice.

§ 776. Importance of Question of Time.
777. Results of Judicial Legislation.
778. Division of Subject.
779. Must be Subsequent to Dishonor.
780. Effect of Payment on Day of Dishonor.
781. May be Given on Last Day of Grace.
782. Time of Dishonor.
783. Refusal to Pay at Maturity.
784. Failure and Qualified Refusal.
785. To Resident of Same Place.
786. Time of Delivery, and Not of Sending.
787. At Place of Business or Residence.
788. Hours at Place of Business.
789. Hours at Place of Residence.
790. Nine o'Clock P. M.
791. When Left on Day of Dishonor.
792. Parties Resident in Different Places.
793. By Mail — Time of Depositing Letter.
794. General Construction of "Reasonable Time."
795. Each Party Has His Day.
796. Statement of Lord Ellenborough.
797. The Day of One Party Not for the Benefit of Another.
798. Consequence of Numerous Parties Taking One Day.
799. Time Not Always Measured by Intervening Days.
800. Difficulties in Applying the Rule.
801. Chitty's Doctrine as to "Next Day."
802. Criticism of Above by Story — Twenty-four Hours.
803. Impracticability of Chitty's Rule.
804. Inconvenience of Story's Rule.
805. Judicial Construction of General Rule.
806. Unreasonably Early Hour.
807. The Hour of Closing Mail.
808. Five o'Clock Too Early.
809. Seven o'Clock Too Early.
810. Six o'Clock the Hour of Closing.
811. Ten Minutes Past Nine o'Clock.
812. Might be Reasonable Earlier Than Nine.
813. Half-past Nine Held Too Early.
814. Rule Construed by Marshall.
815. Not Necessary to be Sent by First Mail.
816. Mere Formal Compliance with Rule Not Required.
817. Agents or Attorneys Have Their Day.

§ 818. Must be Secular Day.
819. Jewish Festival.
820. Sunday.
821. Time Refers to Hour of Mailing.
822. Law of Place of Contract Governs.
823. Consequences of Adopting Unusual Modes.
824. Question of Law and Fact.
825. Waiver and Excuse.
826. Deductions from Authorities Cited.
827. No Exceptions to Rule Requiring Notice in Reasonable Time.

§ 776. **Importance of Question of Time.**— No branch of the subject considered in this chapter is of greater importance than that which treats of the time within which notice of the dishonor of a negotiable instrument *must* or *may* be given, in order to bind the party notified. No question affecting commercial paper has been the subject of more anxious inquiry; none of the mooted questions have provoked a greater amount of litigation, nor drawn out the expression of such a contrariety of opinion; and it is still announced from the bench, and by leading text-writers, that the only *rule* known to the law merchant in this respect is, that the notice must be given *within a reasonable time*, and that what is a reasonable time must in every instance depend upon the circumstances peculiar to each case.[1]

§ 777. **Results of Judicial Legislation.**— In fact, there can be no rule of universal application laid down which will operate with even a tolerable approximation to equality. The circumstances by which the question of the reasonableness of the time is affected are so different in their character that it has been found necessary by the courts to promulgate a separate rule for each class of cases, where susceptible of classification, and these rules have been extended or contracted to suit the novel features of the cases as they have arisen. This question has been so often litigated, and so ably and thoroughly discussed by the courts, that at this day a case can hardly arise, for which some-

[1] Chitty on Bills, 224–5, and cases cited; 1 Pars. N. & B., 507; Story on B., § 285. But see 2 Daniel on Negot. Inst., § 1035.

where in the long line of decisions, reaching back to the time of Lord Mansfield, a precedent may not be found which will serve as a guide to determine what time the giver of the notice might take for the purpose of preparing and serving the same. The principles applicable to almost any given case will be found as well settled as they could be by legislation.

§ 778. **Division of Subject.**— The most important circumstances affecting the time within which notice of dishonor of commercial paper should be given are, 1. The means of communication between the holder of the dishonored instrument and the party to be notified. 2. The holder's knowledge or want of knowledge of the place of residence or business of the party to be notified. 3. The customs of the place where the notice is given with relation to business hours, etc. The time within which notice should be given will also be found to be influenced to a considerable extent by the position occupied upon the dishonored instrument, by the party giving the notice. The influence of these circumstances, and others of less prominence, will be noticed, as instances involving their operation, either separately or together, are given hereafter, without regard to the order of their statement above.

§ 779. **Must be Subsequent to Dishonor.**— In all cases the notice must be given subsequent to the dishonor of the bill or note,[1] which cannot take place prior to the last day of grace, when the paper is entitled, either by statute or the law merchant, to days of grace.[2]

§ 780. **Effect of Payment on Day of Dishonor.**— It was for a long time seriously contended that not only must the notice be subsequent to the demand and refusal, but that it must be on a subsequent day, for the reason that the maker or acceptor was entitled to the entire day of maturity upon which to make payment and discharge himself from liability. The reason of this has been so far recognized that he

[1] Jackson *v.* Richards, 2 Cai., 343.
[2] Lenox *v.* Roberts, 2 Wheat., 373.

was held not to be required to pay the protest fees, if payment were made at any time during the customary business hours of the day, notwithstanding demand may have been made upon him at an earlier hour of the same day.[1]

§ 781. **May be Given on Last Day of Grace.**— Nevertheless, where, upon presentment during any business hour of the day, payment is flatly refused, the holder need not wait until later in the day in order to allow the party an opportunity to obtain the money, or to give him the benefit of any change of mind that may take place, but may give the notice as soon after default as will be convenient for himself, and thereby as effectually charge the parties notified as though he had waited until the last minute of the last hour of the day.[2]

§ 782. **Time of Dishonor.**— Lord Ellenborough laid down the rule fixing the time of dishonor after which notice might be given so as to charge antecedent parties, by declaring that "the note was dishonored as soon as the maker had refused payment on the day when it became due."[3] So, in *Ex parte* Moline,[4] a final refusal to pay, made at 11 o'clock in the forenoon, was held sufficient to excuse the holder or his agent from calling later in the day to repeat his demand.

[1] Osborne *v.* Moncure, 3 Wend., 170. See, also, Hartley *v.* Case, 1 Carr. & P., 555, where it is held that if the acceptor pay the bill during the day of maturity, though after notice of dishonor, the notice comes to nothing.

[2] Coleman *v.* Carpenter, 9 Pa. St., 178; *Ex parte* Moline, 19 Ves. Ch., 216; Haynes *v.* Birks, 3 Bos. & P., 599; Hine *v.* Allely, 4 B. & Ad., 624; Shed *v.* Brett, 1 Pick., 401; Lindenberger *v.* Beall, 6 Wheat., 104; Bussard *v.* Levering, 6 Wheat., 102; Thorpe *v.* Peck, 28 Vt., 127; Curry *v.* Bank of Mobile, 8 Port. (Ala.), 360; McClane *v.* Fitch, 4 B. Mon., 599; Corp *v.* McComb, 1 Johns. Cas., 328; Smith *v.* Little, 10 N. H., 526.

[3] Burbridge *v.* Manners, 3 Camp., 193. But see Gilbert *v.* Dennis, 3 Metc., 495, where it is held that notice given during the forenoon of the last day is insufficient.

[4] *Supra*, § 781.

§ 783. **Refusal to Pay at Maturity.**— So, also, in Coleman *v.* Carpenter,[1] where the note was presented for payment on Saturday at the residence of the maker, and the holder was informed that the party was not at home, but would return on Monday and pay the note, this was held as a flat refusal, and notice given the same day was regarded as sufficient.

§ 784. **Failure and Qualified Refusal.**— And in one case, the notice given on the day of dishonor was held good, though there was only a qualified refusal to pay, the acceptor saying, when the bill was presented, that he had no effects, but expected to have them in the course of the day. This was regarded as an actual dishonor, sufficient to warrant the notification of antecedent parties.[2]

§ 785. **To Resident of Same Place.**— When the holder or other party from whom notice is required, or the agent of such party, resides or carries on business in the same town, city or village as the prior party to be notified, the notice must be delivered personally, or at the residence or place of business of such prior party, at furthest on the day next succeeding that upon which the default of payment was made, provided the one giving the notice can, by the exercise of reasonable diligence, ascertain the residence or place of business of the party to be notified.[3]

§ 786. **Time of Delivery, and Not of Sending.**— As between parties residing or carrying on business in the same place, the time of giving notice relates to the day, and the hour of the day, in which the same is delivered, and not to the day or hour of despatching the messenger. It would not, therefore, be considered as a sufficent compliance with the law, in the absence of a reasonable excuse for delay, where the message was forwarded to a resident drawer or indorser on the day following the day of dishonor, if such

[1] *Supra*, § 781.
[2] Hartley *v.* Case, 1 Car. & P., 555.
[3] Tindal *v.* Brown, 1 T. R., 167.

message was not delivered until the next succeeding day,[1] except where service between such parties may be by mail.[2]

§ 787. **At Place of Business or Residence.**—One of the circumstances affecting the service of notice between residents of the same city, town or village, with respect to the time of service, when the mode is by leaving the notice with some one other than the party to be notified, is the *place* where such notice is left. Though the holder of the instrument may, at his option, leave the notice at the residence or place of business of the drawer or indorser,[3] the hours of the day within which such notice may be effectually served at these two places are essentially different.

§ 788. **Hours at Place of Business.**—Where the notice is served upon a party to a bill or note by leaving it at the place of business of such party with some one other than the one for whom it is intended, it must be so left during the ordinary business hours of the day.[4]

§ 789. **Hours at Place of Residence.**—Where, on the other hand, the holder or his agent serves the notice by leaving it at the residence of the party, it may be at any time before the usual hour of retiring for the night.[5]

§ 790. **Nine o'Clock P. M.**—It was accordingly held, in one instance, that a party who had received notice of the dishonor of a note indorsed by him, might notify an antecedent indorser by leaving the notice for him, at his place of residence, at 9 o'clock of the night of the day following that upon which he received notice of the default of payment.[6]

[1] Ireland *v.* Kip, 11 Johns., 231; Williams *v.* Bank of U. S., 2 Peters, 100; Smedes *v.* Utica Bank, 20 Johns., 372; Cabot Bank *v.* Warner, 10 Allen, 522; Grinman *v.* Walker, 9 Ia., 426.

[2] See *post*, § 869 *et seq.*, where the postal delivery system is held to obviate the necessity of personal service of notice between residents of the same place.

[3] See *post*, § 863.

[4] Adams *v.* Wright, 14 Wis., 408; Cayuga County Bank *v.* Hunt, 2 Hill, 635.

[5] Adams *v.* Wright, 14 Wis., 408.

[6] Jameson *v.* Swinton, 2 Taunt., 224.

§ 791. When Left on Day of Dishonor.— Nevertheless, a notice left at the residence of the party on the night of the day of dishonor, or even given by an indorser the day when he received notice, too late to operate as notice for that day, would be a good and sufficient notice for the following day, and so be in time to bind the party notified if otherwise properly served.[1]

§ 792. Parties Resident in Different Places.— When the party giving the notice and the party notified reside in different places,— that is to say, within or near different cities, towns or villages, so that they are accustomed to resort to different postoffices for their letters, or where their residences are too far apart to render personal service, or its legal equivalent, practicable,— the most important circumstance, affecting the time of giving notice, is the means of communication between them.

§ 793. By Mail — Time of Depositing Letter.— For the purpose of giving notice of the non-acceptance or non-payment of negotiable paper to non-residents, the means of communication most favored is the public post. Where the notice is inclosed in a letter and sent through the mails, the question of diligence is considered with reference to the time of depositing the letter in the postoffice and not the date of its receipt by the party to whom it is addressed.[2]

§ 794. General Construction of Reasonable Time.— So long as the courts had no rule as to the time of giving notice, beyond the requirement that it should be *reasonable*, they, as well as the business public, were subject to no little embarrassment in settling upon a construction of this vague and uncertain limitation. To leave this as a simple question of fact to the jury did not have a tendency to the promotion of certainty in results. It was found, also, that to require notice "as soon after the dishonor of the instrument as practicable," according to the doctrine of some of the earlier cases, would have a tendency to compel unreasonable

[1] See § 829.

[2] See cases cited *infra*, § 821.

haste, and thus enhance the risk of fatal mistakes; to force the holder to neglect all other business so as to bestow his entire attention upon the giving of the notice, and that the inquiry into all the circumstances by which the notice might have been delayed for a few hours, would involve the rendering of too nice and exact an account, by the one giving the notice, of the manner in which his time had been disposed of between the dishonor of the paper, or the receipt of the notice by him, and the sending or delivery of the notice to the antecedent party. Hence, for the purpose of promoting certainty and safety in dealings in negotiable securities, it was deemed necessary to give the term *reasonable*, as applied to notices of this sort, a legal construction. It was accordingly held, and has now become a settled rule of the law merchant, that in no instance shall the notice be required to be given on the day of the demand and default of payment; but it shall be sufficient, if given or sent *on the next succeeding day thereafter*.[1]

§ 795. Each Party Has His Day.— This rule has been extended so as to give indorsers who receive notice the same advantages as to time for transmitting it to antecedent parties as are enjoyed by the holder, so that each party has his day in which to give notice to antecedent parties, which, in case of an indorser, means the day following that on which he receives notice, whatever be the lapse of time between the date of dishonor and the receipt of the notice from the party subsequent to him.[2]

[1] Chick *v.* Pillsbury, 24 Me., 458; Manchester Bank *v.* Fellows, 28 N. H., 302; Grand Bank *v.* Blanchard, 23 Pick., 305; Whitwell *v.* Johnson, 17 Mass., 449; Carmena *v.* Bank of La., 1 La. An., 369; Blackman *v.* Leonard, 15 La. An., 59; Neal *v.* Taylor, 9 Bush, 380; Whitlesey *v.* Dean, 2 Aikens, 263; Langdale *v.* Trimmer, 15 East, 291; Darbishire *v.* Parker, 6 East, 3; Bartlett *v.* Howley, 120 Mass., 92.

[2] United States Bank *v.* Goddard, 5 Mason, 366; Sussex Bank *v.* Baldwin, 17 N. J. L., 487; Carter *v.* Burley, 9 N. H., 558; Howard *v.* Ives, 1 Hill, 263; Hartford Bank *v.* Stedman, 3 Conn., 489; Dobree *v.* Eastwood, 3 Carr. & P., 250; Turner *v.* Leech, 4 B. & Ald., 451; Rowe *v.* Tipper, 20 Eng. L. & Eq., 220; 3 Kent, Com., 106.

§ 796. Statement of Lord Ellenborough.— This rule and the reason upon which it is founded is given by Lord Ellenborough in the case of Bray *v.* Hadwen,[1] in the following language: "It has been laid down, I believe, since the case of Darbishire *v.* Parker, as a rule of practice, that each party into whose hands a dishonored bill may pass, should be allowed one entire day for the purpose of giving notice. A different rule would subject every party to the inconvenience of giving an account of all his other engagements, in order to prove that he could not reasonably be expected to send notice by the same day's post which brought it. * * * It has moreover this advantage, that it excludes all discussion as to the particular occupations of the party on that day."

§ 797. The Day of One Party Not for the Benefit of Another.— Nevertheless, it should be borne in mind that the day to which one party is entitled within which to prepare and forward his notice to prior parties, cannot be availed of by a subsequent party to prolong the time within which *he* may notify the more remote party.[2] This principle is illustrated by the case of Rowe *v.* Tipper.[3] There the note was dishonored on Saturday, and notice was given by the holder to his immediate indorser on the Monday following. The party so notified might have bound the next antecedent indorser by notice on Tuesday, but failed to do so, and the holder undertook to supply the omission of giving notice on that day, which was two days after the date of demand and non-payment to such antecedent indorser. The last notice was held too late, for the reason, as expressed in the opinion of the court delivered on that occasion, that "if the holder seeks to avail himself of notice of dishonor given by him to remote indorsers, it must be

[1] 5 Maule & Sel., 68.

[2] Manchester Bank *v.* Fellows, 28 N. H., 302; Brown *v.* Furguson, 4 Leigh, 37; Turner *v.* Leech, 4 B. & Ald., 451.

[3] *Supra*, § 795.

given within the time he should have given notice to his own immediate indorser."[1]

§ 798. Consequence of Numerous Parties Taking a Day. The application of this rule, where the dishonored instrument bears numerous indorsements, might result in greatly prolonging the time from the date of dishonor until the first indorser or the drawer was notified of the fixing of his liability. Should each successive indorser avail himself of the day allowed him for the purpose of preparing and forwarding the notice, and should be content to give the notice to his immediate indorser, leaving the latter to notify the parties antecedently liable, the time thus consumed, when taken together with the necessary time for transportation, might, from days, grow into weeks, or even months, before the notice reached the party last entitled thereto. Notwithstanding the circuitous course taken by the notice, in a case of this kind, and although it might have been given in a much shorter time by the holder directly to the drawer or first indorser, it will be none the less binding on account of the delay.[2]

§ 799. Time Not Always Measured by Intervening Days. When a notice is thus sent to each party in succession, and any one or more of such parties sends or delivers the notice to those who are antecedent to him, on the same day he receives it, this will shorten the time for the drawer or first indorser, because no antecedent party will be permitted to take advantage of the time thus gained.[3] The number of

[1] A *dictum* in the case of Etting *v.* Schuylkill Bank, 2 Pa. St., 355, lays down the general rule that when notice "is given by the holder directly, it is soon enough, if it reach the particular indorser as soon as it would have reached him circuitously through the subsequent indorsers, each of whom are entitled to an entire day, if he choose to insist on it, to hand it on." This singular misinterpretation of the authorities, however, has no following.

[2] Smith *v.* Roach, 7 B. Mon., 17; Whitman *v.* Farmers' Bank, 8 Port. (Ala.), 258; Fitchburg Bank *v.* Perley, 2 Allen, 433.

[3] Simpson *v.* Terney, 5 Humph., 419; Marsh *v.* Maxwell, 2 Camp., 210, note.

days, therefore, intervening between the dishonor of commercial paper, and notice to the drawer or first indorser, may not always be measured by the number of indorsers, even where there are no unusual or unexpected obstructions to the transmission of the notice from one to another.

§ 800. **Difficulties in Applying the Rule.**— In applying the rule giving the holder or indorser until the day after dishonor to notify prior parties, comparatively little difficulty has been experienced where the parties between whom the notice passed were residents of the same place. But when the situation of the parties rendered the mail the most convenient mode of communication, the question has been involved in some difficulty.

§ 801. **Chitty's Doctrine as to "Next Day."**— Mr. Chitty lays down the rule that "where the notice is to be sent by the general post, then the holder, or party to give the notice, must take care to forward notice by the post of the next day, after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place where he is, early or late."[1]

§ 802. **Criticism of Above by Story — Twenty-four Hours.**— Judge Story, however, holds the rule to be less strict than as laid down by Mr. Chitty, and expresses his views of the doctrine as follows: "It would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that therefore it will be sufficient if he send it by the next post that goes after twenty-four hours from the time of the dishonor. Thus, suppose the dishonor is at 4 o'clock P. M., on Monday, and the post leaves on Tuesday at 9 or 10 o'clock, it seems to me that the holder need not send by that post, but may safely wait and put the notice into the postoffice early enough to go by the post on Wednesday morning at the same hour."[2]

§ 803. **Impracticability of Chitty's Rule.**— A strict adhesion to the rule laid down by Mr. Chitty, instead of af-

[1] Chitty on Bills, 458 (9th ed.).

[2] Story on Bills, § 291 (note); id., § 291.

fording the holder or party giving the notice a reasonable time to prepare and forward the same, might render it utterly impracticable for him to notify prior parties within the time thus arbitrarily prescribed. Suppose the notice to be given an indorser about the last quarter of his usual hour of retiring for the night, which, in some places, would be at 12 o'clock. Suppose the first mail of the succeeding day should leave, in the early part of the first hour of the day, which would be some time previous to 1 o'clock, and might be but a few minutes past 12. Thus the time within which the indorser, notified at his residence, would be required to prepare his notice to antecedent parties, and deposit it in the postoffice, might be reduced to a very few minutes. Lord Ellenborough, in rendering the opinion of the court in Smith *v.* Mullett,[1] says that "each man has a day. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed. A man and horse will be employed, and you will have a race against time."

§ **804. Inconvenience of Story's Rule.**— On the other hand, the twenty-four hour rule is equally foreign to the purpose for which *one day* was fixed upon as the proper time to allow parties within which to give such notices. The object was to insure a reasonable time to the giver of the notice, so that he might not be forced to neglect other business in order to attend to the matter of giving the notice. To follow the rule allowing twenty-four hours would require the court, in every instance, to engage in nice computations of fractions of a day, which is a practice universally looked upon with judicial disfavor.[2] The doctrine, as announced by the learned author, is unsupported by authority.

§ **805. Judicial Construction of General Rule.**— The construction which has been placed upon the above rule,[3] by the best considered cases, both in this country and Great

[1] 2 Camp., 208.
[2] 2 Blackst. Com., 141.
[3] *Supra*, § 794.

Britain, is that the notice should be sent by the post of the day following that upon which default is made, *provided the hour of departure is not unreasonably early, or before a convenient hour for business.*[1] Should the only mail of the day take its departure at an hour in the morning too early for business purposes, then it would be sufficient if posted in time for the out-going mail of the next succeeding day.

§ 806. **Unreasonably Early Hour.**— What is an unreasonably early hour to be required to attend to the business of forwarding the notice must be separately determined in each case by the finding of a court or jury. The hour will vary according to the locality and the circumstances of the party sending the notice, and may change in any given locality as the customs and habits of the business men of such place are altered.

§ 807. **The Hour of Closing Mail.**— An instance of an hour which would probably be regarded as too early in any business community will be found in the case of Bank of Alexandria *v.* Swann,[2] where the mail took its departure between the hours of 12 o'clock of the night after default, and 2 o clock A. M. of the day following the day of dishonor. Of course the party from whom the notice was due was not required to prepare and post the same at such an early hour as this. Besides, as in all probability the mail departing at such an early hour would be closed against the receipt of letters, previous to 12 o'clock of the night of the day of dishonor, it could not reasonably be called the mail

[1] Lawson *v.* Farmers' Bank, 1 Ohio St., 206; Burgess *v.* Vreeland, 24 N. J. L., 71; Wemple *v.* Dangerfield, 2 Sm. & M., 445; Stephenson *v.* Dickson, 24 Pa. St., 148; Fullerton *v.* Bank of U. S., 1 Pet., 604; Bank of Alexandria *v.* Swan, 9 Pet., 33; Carter *v.* Burley, 9 N. H., 558; Sussex Bank *v.* Baldwin, 17 N. J. L., 487; Downs *v.* Planters' Bank, 1 Sm. & M., 261; Chick *v.* Pillsbury, 24 Me., 458 (overruling Goodman *v.* Norton. 17 Me., 381 and Beckwith *v.* Smith, 22 id., 125); Davis *v.* Hanley, 12 Ark., 645; West *v.* Brown, 6 Ohio St., 542; Mitchell *v.* Cross, 2 R. I., 437; Hawks *v.* Salter, 4 Bing., 715; Geill *v.* Jeremy, 22 Eng. C. L., 249; Williams *v.* Smith, 2 B. & Ald., 496.

[2] 9 Pet., 33.

of the *next* day.[1] The case cited sufficiently illustrates the propriety of considering the day and hour of *closing*, rather than that of the *departure* of mails. There the mail was closed at 9 o'clock P. M. of the day of dishonor, and took its departure at sunrise of the following day, and the court decided the mail to be of the day upon which it was closed, and the notice to an indorser, posted on the day following that upon which the note was dishonored, was held good, although there was no other mail going in the direction of the indorser's residence until the second day thereafter.

§ 808. **Five o'Clock Too Early.**— It was also held, in West *v.* Brown,[2] that 5 o'clock was an hour of the morning too early for business; so that where the mail departed at that hour, a notice posted at 9 o'clock thereafter would be sufficient, regardless of the time of departure of the next mail.

§ 809. **Seven o'Clock Too Early.**—In Davis *v.* Hanley,[3] 7 o'clock was the hour at which it would have been necessary to post the notice "if the first mail of the next day" had been insisted upon; but the court held this unreasonably early for business.

§ 810. **Six o'Clock the Hour of Closing.**— So, in Chick *v.* Pillsbury,[4] 6 o'clock was the hour of closing the mails, and this was held too early to require the deposit of notice, as it was earlier than the business men of the community would be stirring. This was decided without reference to the hour of departure.

§ 811. **Ten Minutes Past Nine o'Clock.**— In Lawson *v.* Farmers' Bank,[5] ten minutes past 9 was held to be not unreasonably early, "or before a reasonable and convenient time after the commencement of early business hours of the day" in the city of Pittsburgh, Pennsylvania.

[1] Farmers' Bank *v.* Duvall, 7 Gill & J., 78.
[2] 6 Ohio St., 542.
[3] 12 Ark., 645.
[4] 24 Me., 458.
[5] 1 Ohio St., 206.

§ 812. **Might be Reasonable Earlier Than Nine.**— In Davis *v.* Planters' Bank,[1] the notice was deposited in the postoffice at 9 o'clock on the morning of the day next succeeding that upon which the instrument was dishonored, and the court held substantially that this was insufficient unless it further appeared that the mail left subsequent to that hour, or, if prior thereto, at an unreasonably early hour.

§ 813. **Half-past Nine Held Too Early.**— In Hawks *v.* Salter,[2] however, the hour of the mail's going out was half-past 9 o'clock on the morning of the day the notice was required to be sent. This was held too early for business men to attend to the posting of notices, and consequently a notice deposited in the receiving office later in the day was held sufficient.

§ 814. **Rule Construed by Marshall.**— The principle upon which the holder or other party sending the notice is excused from posting it at a very early hour is generally regarded as consistent with some of the authorities cited, where, as in Lenox *v.* Roberts,[3] it is held by Chief Justice Marshall that "a demand of payment should be made upon the last day of grace, and notice of the default of the maker be put into the postoffice early enough to be sent by the mail of the succeeding day." The proviso that the mail closes at a reasonably early hour is added as a rational explanation of the meaning of "the mail of the succeeding day," so as to render the rule applicable to cases where there is but one mail on such day, and there is a question whether, with reasonable diligence, the notice might have been sent by that.[4]

§ 815. **Not Necessary to be Sent by First Mail.**— It has been contended, as we have noticed, that, in order to charge drawers and indorsers of commercial paper with notice sent

[1] 1 Sm. & M., 261.
[2] 4 Bing., 715.
[3] 2 Wheat., 373.
[4] *Supra.*

through the mails, it is essential that the notice should go by the first mail of the day succeeding the day of maturity and demand;[1] but whatever difference of opinion there may have existed at one time upon this question, it may now be regarded as fully settled by authority, that where two or more mails take their departure on the day succeeding the day of dishonor to the place where the party to whom the notice is addressed has his residence, *notice sent by either of such mails will be sufficient.*[2]

§ 816. Mere Formal Compliance with Rule Not Required.— And where there is no regular outgoing mail on the next day after the dishonor, which leaves at a reasonable hour for business, the notice will be sufficient if deposited in time for the *next* regular mail that goes in the required direction, regardless of the number of days that may intervene between the dishonor of the bill or note, and the departure of the mail by which notice of non-payment is conveyed to the party to be charged.[3] The law does not exact a mere formal compliance, which must necessarily prove fruitless of results. The notice might as well be lying in the private desk of the holder as in the postoffice awaiting the time for the departure of the mail.

§ 817. Agents or Attorneys Have Their Day.— When it is said that a holder or indorser is entitled to a day within which to prepare and post the notice to non-residents, or to serve notice upon prior parties who reside in the same place, it will be understood that this applies as well to agents or attorneys who merely hold or indorse the paper, to facilitate collection, as to holders and indorsers for value.[4]

[1] Chitty on Bills, 485 (11th Am. from 9th Lond. Ed.), and cases cited.

[2] Carter *v.* Burley, 9 N. H., 558; Whitwell *v.* Johnson, 17 Mass., 449; Allen *v.* Avery, 47 Me., 287.

[3] Montelius *v.* Charles, 76 Ill., 303; Geill *v.* Jeremy, 22 Eng. C. L., 249; S. C., 1 M. & M., 61.

[4] Sussex Bank *v.* Baldwin, 17 N. J. L., 487; Firth *v.* Thrush, 15 Eng. C. L., 242; Robson *v.* Bennett, 2 Taunt., 388; Haynes *v.* Birks, 3 Bos. & P., 599; Langdale *v.* Trimmer, 15 East, 291; Daly *v.* Slatter, 4 Car. & P., 200.

§ 818. **Must be Secular Day.**— The statement that the holder or indorser who has received notice must send or deliver the notice, according to the relative situation of the parties, on the day succeeding that upon which the note or bill was dishonored, or notice thereof was received by the indorser, must be accepted with the qualification that where either the day upon which the notice is received, or the day succeeding the date of dishonor or receipt of notice, is a public holiday, or a day set apart by the religious denomination to which the party charged with the duty of giving the notice belongs, as a religious festival, or as sacred from secular affairs, such day will not be computed as forming any part of the time within which the party is required to attend to the giving or sending of the notice.[1]

§ 819. **Jewish Festival.**— So where the day following that upon which an indorser, who was a Jew, received notice, was set apart as a Jewish festival, upon which it was held, by those of that faith, unlawful to attend to their secular affairs, it was held that the commercial law had such regard for the consciences of men, of whatever religious persuasion or belief, that in this instance the party would not be required to send the notice during the continuance of such festival, but it would be regarded as sufficient if sent on the day following that held sacred to religious observances.[2]

§ 820. **Sunday.**— So, also, where notice of default in payment of a note, indorsed by the party receiving it, came to his hands, inclosed in a letter, on Sunday, he was not bound to open the letter until Monday, and was entitled to treat the notice as though it were received on Monday, and it was held that notice sent by him on the following Tuesday would be in sufficient time to bind the prior party to whom it was addressed.[3]

[1] Howard *v.* Ives, 1 Hill, 263; Hartford Bank *v.* Stedman, 3 Conn., 489.

[2] Lindo *v.* Unsworth, 2 Camp., 602; Farmers' Bank *v.* Vail, 21 N. Y., 485; Hallowell *v.* Curry, 41 Pa. St., 322.

[3] Crawford *v.* Milligan, 2 Cranch C. C., 226; McElroy *v.* English, id., 528.

§ 821. Time Refers to Hour of Mailing.— When the service of notice is by mail, the *time* has reference to the day when it is deposited in the postoffice, and not the date of its receipt by the party to be charged. When the party sending the notice has deposited the same in the office, properly addressed to the prior party, he has performed his entire duty, so far as that particular party is concerned. It is of no consequence to him what accidents or delays intervene to prevent the party from receiving the notice seasonably, or from receiving it at all. Having no control over the postoffice department, or any of its officers or employees, he is not responsible for any act of negligence on their part, by which prior parties to the instrument are prevented from receiving notice in due time.[1]

§ 822. Law of Place of Contract Governs.— Although the regularity of the protest of a foreign bill of exchange is governed by the law of the place of acceptance and payment, whatever affects the sufficiency of the notice of dishonor of negotiable securities of any kind must be determined by the law of the place where the contract is made. That is, where the question is the sufficiency of notice to the indorser, it must be solved according to the laws and customs of the place where the contract of indorsement was entered into; and where the drawer is the party to be notified, by the law of the place where the bill was drawn.[2]

§ 823. Consequence of Adopting Unusual Modes.— Where the party giving the notice, and he to whom it is given, reside in different places, so that the manner of communicating between them is generally through the post-

[1] Jones *v.* Wardell, 6 W. & S., 399; Mt. Vernon Bank *v.* Holden, 2 R. I., 467; Nevius *v.* Bank, 10 Mich., 547; Marshall *v.* Baker, 3 Minn., 320; Loud *v.* Merrill, 45 Me., 516; Harris *v.* Robinson, 4 How., 336; Bank *v.* King, 14 N. J. L., 45; Woodcock *v.* Houldsworth, 16 M. & W., 124.

[2] Wallace *v.* Agry, 4 Mason, 336; Aymar *v.* Sheldon, 12 Wend., 439; Hyatt *v.* Bank of Ky., 8 Bush, 193; Chick *v.* Pillsbury, 24 Me., 458; Whitwell *v.* Johnson, 17 Mass., 449; Bank of Alexandria *v.* Swann, 9 Pet., 33; Hawks *v.* Salter, 4 Bing., 715.

office, this is not to be understood as the exclusive medium which may be employed. Notice of dishonor may be sent by express, or by the hands of any common carrier, or a private messenger may be employed to carry the same, whatever be the distance the parties may live apart. But where there may be communication by mail, the adoption of other means shifts the time, to be considered in arriving at a determination of the question of diligence on the part of the one giving the notice, from the day of *sending* to the day of *receiving* the notice. In other words, by the adoption of other modes, the party assumes all the risks of delay in transportation, and will not only be required to show diligence in his messenger or carrier, but must further establish that the notice reached the party to be charged on the same day it would have come to hand had it been sent by mail; but it need not appear that it was delivered at the same hour of the day it would have arrived by the mail.[1]

§ 824. **Question of Law and Fact.**— The rule giving to holders and indorsers one day within which to send notice to prior parties, as hereinbefore explained, should be understood as a rule of enlargement, rather than of limitation of the time within which notice should be given. The principles upon which the rule is founded, as well as the occasion for its establishment, seem to place it clearly in this light. It does not import that one who fails to send or give notice within the time fixed by the rule is necessarily guilty of negligence. It does declare that any one who sends or delivers the notice within the time allowed shall not be treated as negligent, merely because he might, by excessive diligence, have given or sent the notice sooner. This rule only becomes restrictive upon those from whom notice is due, when they can show neither a waiver of the delay by those entitled to notice, nor a reasonable excuse for not notifying the ante-

[1] Spalding *v.* Krutz, 1 Dill. C. C., 414; Bancroft *v.* Hall, 1 Holt, 476; Pearson *v.* Crallan, 2 Smith, 404.

cedent parties on the day following that of dishonor. In other words, when the one-day rule of diligence is observed, the question of reasonableness of the time consumed is one purely of *law*.[1] Whereas, when the sender of the notice indulges himself beyond this, it becomes a mixed question of law and fact.[2] The facts being ascertained, whether the notice was in a reasonable time becomes a question of law.[3]

§ 825. **Waiver and Excuse.**— The circumstances properly submissible to the jury under the instructions of the court, which go to establish either a waiver of the objections as to time, or to excuse delay beyond the day allowed by law, are exceedingly various in their character, and, for the purpose of avoiding useless repetition, have been reserved for separate treatment in a subsequent part of this chapter.[4]

§ 826. **Deductions from Authorities Cited.**— The reader who has followed the current of authorities on this branch of our subject has probably discovered that although there is no rule as to time, applicable to all cases, more definite than the requirement that the notice must be within a reasonable time, still there are a number of rules by which the term "reasonable" is clearly defined, in its application to cases of different classes. Each class furnishes its own rule, and notwithstanding the conservative inclination of the courts, these rules have been allowed to grow until they have become as thoroughly incorporated into the law merchant as any other portion of this important branch of our jurisprudence.

§ 827. **No Exceptions to Rule Requiring Notice in Reasonable Time.**— It cannot fairly be said, in cases where notice within the time is either waived or excused, that they furnish exceptions to the rule. The general rule under which they are associated with the cases in conformity with

[1] Bray *v.* Hadwen, 5 M. & S., 68.
[2] Williams *v.* Smith, 2 B. & Ald., 496.
[3] Darbishire *v.* Parker, 6 East, 3.
[4] See *post*, V, Waiver and Excuse.

the particular rule allowing but one day for notice is that which requires notice in a *reasonable time*. To this rule there are no exceptions. Notice is never required to be given or sent on the day following the day of default, when such requirement would be unreasonable. The instances in which notice, within the time mentioned, is either waived or excused, do not come within the more restricted rule.

IV. Manner and Mode of Giving Notice.

§ 828. Division of Subject.
829. Where and How Served, if Duly Received
830. Illustration of Above.
831. Whether Written or Oral.
832. Verbal Notice Delivered to Wife.
833. Should be Written to Distant Parties.
834. Form and Contents.
835. No Form Prescribed.
836. Immaterial Omissions.
837. Date of Maturity Held Immaterial.
838. Omission of Name of Payee.
839. Clerical Error Will Not Always Vitiate.
840. Mere Ambiguities Not Fatal.
841. Must Show Presentment on Business Day.
842. Signed by One Having Authority.
843. Where and How Served.
844. Parties Residing in Same Place.
845. Indorser Temporarily Absent.
846. What Constitutes Place of Business.
847. Where Residence Known.
848. By Post, Delivery Must be Proved.
849. Different Meaning of the Word Town.
850. By Post, Between Different Villages in Same Town.
851. Leaving at Place of Residence or Business.
852. Residence in One Place, Business in Another.
853. "Place of Business" and "Residence," and What Amounts to Leaving Notice at Either.
854. Residence.
855. Need Not be Domicile.
856. Leaving Notice at Residence.
857. Leaving at Boarding House.
858. Leaving at Counting House with Pretended Agent.
859. Will Not Suffice to Leave Near the Place.
860. Illustration of Same Principle.
861. Corresponding Number Not Sufficient to Identify.
862. Several Places of Business, Either Will Suffice.
863. Holder May Elect Between Place of Business and Residence.
864. May be Left When No One There to Receive it.
865. At Business Place, Must be to Proprietor.
866. Office of Directors of Corporation.
867. Case Distinguished from Above.
868. Difference in Time at Residence or Business Place.

§ 869. By Mail Between Residents of Same Place.
870. Letter Carriers.
871. Drop Letters Required to be Stamped.
872. Penny Post.
873. Baltimore and Other Large Cities.
874. Established Custom of Bank.
875. May be Sent by Post When Authorized by Indorser.
876. Parties Living Near Place of Dishonor.
877. Illustration of Same.
878. Partners — One Resident, One Non-resident.
879. Case Requiring Personal Notice to Country Indorser.
880. Indorser Three Miles Distant.
881. Party Residing at a Great Distance from Postoffice.
882. Parties Residing Near Different Post Towns.
883. Office to Which Party Usually Resorts,
884. General Adoption of Service by Mail.
885. Exceptional Case.
886. Necessity of a Rule.
887. Different Offices in Same Town.
888. General Direction to Town *Prima Facie* Sufficient.
889. Private Messenger.
890. Addressed to Residence or Business Place When Known.
891. Must be Addressed to Place of Residence.
892. Indorser May be Notified at Place He Pretends to Reside.
893. Exception to Cases Where Mail Most Convenient Mode.
894. When Holder May Choose Between Places.
895. Illustration of Above.
896. *Contra.*
897. Distance Made the Governing Fact.
898. Criticism of Foregoing — True Rule.
899. To Principal Office of Parish.
900. To County Seat.
901. To Principal Office of Town.
902. Should be Inquiry Made.
903. Proper Inquiry for Residence in Another Town.
904. Sufficient Inquiry Question for Jury.
905. Transient Indorser.
906. Temporary Abode Not Residence.
907. Member of Congress.
908. Last Known Residence, When Sufficient.
909. Diligent Inquiry for Unknown Residence.
910. Inclosing Notices to All, to Last Indorser.
911. Transitory Place of Business.
912. By Mail When Holder and Indorser Are Fellow Townsmen.
913. When Agent in Same Place with Holder.

§ 914. Circuitous Notice by Mail Between Residents of Same Place.
915. Designated Place of Payment — Inquiry.
916. Put Upon Inquiry.
917. Insufficient Inquiry.
918. Sending Notice to Where Instrument Dated, Insufficient.
919. Inquiry of Maker, Insufficient.
920. Acting on Information from One of the Parties, Sufficient.
921. Inquiry of Drawer.
922. Previously Acquired Knowledge.
923. Former Communications.
924. Surname Alone Insufficient.
925. Delay Chargeable to Indorser.
926. Holder Misled by Place of Date.
927. Address Should Include Name of State.
928. When Address Designated by Indorser.
929. Delay from Sending by Unusual Route.

§ 828. **Division of Subject.**— In deciding whether notice of the dishonor of negotiable paper has been given in a proper manner and by the proper modes, the questions of primary consideration are, 1. Whether the notice should be oral or in writing; 2. Its form and contents; 3. Where and how it should be served upon the party to be charged.

§ 829. **Where and How Served, if Duly Received.**— The importance of the last mentioned of these considerations only arises in the event of a failure, on the part of the party sending or delivering the notice, to trace it to the person to be notified. If the notice be full and accurate enough to inform the party to be charged of all the important particulars connected with the dishonor of the bill or note; if sent or delivered in the proper time, *by* the proper party, and *to* the proper party, and by him duly received, it becomes immaterial whether it was personally delivered by the party interested in charging him with notice, by a private messenger, or was inclosed in a letter sent through the mails. It may be delivered at the residence or place of business of the party notified, come to his hand in the midst of a public gathering, overtake him on his travels, or be handed to him on the street, with equal effect, provided the important fact that he actually received it can be established. It is only when, through misadventure or accident, the notice has

failed to reach the indorser or drawer sought to be charged, in due time, or the fact of its receipt is difficult to establish, that the manner of service becomes of any importance.[1]

§ 830. **Illustration of Above.**— So it has been held that, where a note was dishonored in the same place where the indorser resided, and might have been personally served with notice of the dishonor, that a written notice, sent through the postoffice, and received by him on the day he would have been entitled to receive it had it been personally served, being in proper form, and containing information of the dishonor, so expressed as to convey intelligence thereof to the indorser, was sufficient, notwithstanding the irregularity of the manner of sending it.[2]

§ 831. **Whether Written or by Parol.**— For the purpose of perpetuating the evidence, and establishing the fact in case of dispute, the notice should generally be in writing. This is invariably true of foreign bills, from the necessity of the case. There, in order to charge prior parties with notice, it becomes necessary to have the bill officially protested, and the writing of the notice follows, almost as matter of course. But in case of a negotiable promissory note or an inland bill of exchange, where the drawer or indorser may be charged with notice without protesting the paper, there is a greater likelihood of a departure from the safe and convenient method of giving notice in writing. And unless otherwise provided by statute, a verbal notice will be as effective as a written one, provided it conveys the necessary information between the proper parties, within the prescribed time.[3]

[1] Dickens *v.* Beal, 10 Pet., 572; Bradley *v.* Davis, 26 Me., 45; Hyslop *v.* Jones, 3 McLean, 96; Nevius *v.* Bank of Lansingburgh, 10 Mich., 547; Smedes *v.* Utica Bank, 20 Johns., 371; Dicken *v.* Hall, 87 Pa. St., 379; First Nat. Bank *v.* Wood, 51 Vt., 471.

[2] Grinman *v.* Walker, 9 Iowa, 426; Shaylor *v.* Mix, 4 Allen, 351; Cabot Bank *v.* Warner, 10 id., 522.

[3] Housego *v.* Cowne, 2 M. & W., 348; Williams *v.* Bank of United States, 2 Peters, 96; Metcalf *v.* Richardson, 20 Eng. L. & Eq., 301; Thompson *v.* Williams, 14 Cal., 160.

§ 832. **Verbal Notice Delivered to Wife.**— In the case of Housego *v.* Cowne, the notice was less direct than an ordinary verbal notice delivered by the holder or his messenger to the party to be charged, because, in that case, the communication was made to the wife of the party. While the authority of this case may be doubted, so far as it approved of a notice delivered by word of mouth, to any one but the party to be charged, still it seems in accord with other authorities in so far as it asserts the validity of verbal notice of dishonor.[1]

§ 833. **Should be Written to Distant Parties.**— Where the party whose duty it is to give the notice resides at a distance from the party sought to be charged, it is unsafe, extremely inconvenient, and sometimes absolutely impossible, to give the notice otherwise than in writing. It is *unsafe* to send a private messenger, where the notice may properly be inclosed in a letter and sent by the post, because the party sending the messenger renders himself liable for the consequences of all the delays resulting from the employment of the unusual medium of communication, and assumes all the risk of the notice being faithfully delivered by his representative.[2] The *inconvenience* and additional expense of sending a verbal notification, when it may be sent through the post, is so manifest as not to require illustration. It becomes *impossible* to give sufficient notice verbally when, from the peculiar situation of the parties, and the means of travel between them, to undertake to make oral communication of the fact of dishonor, or to send a private messenger for that purpose, would involve material delay beyond the time within which the notice would reach the party by the post.[3]

§ 834. **Form and Contents.**— As to the form of the notice there is no inflexible rule. It will be in substantial conformity to law if it contains a description of the bill or

[1] Compare cases cited above.
[2] *Infra.*
[3] *Infra.*

note, drawn with sufficient accuracy to identify the same, together with the information that the paper has been duly presented and dishonored, and that the party notified is looked to for reimbursement.[1] The end to be accomplished by the notice is to inform the party notified that the particular paper was presented at maturity for payment and payment refused. This may be done with considerable circumlocution and verbiage, or very tersely and succinctly, with the same effect. But whatever form of words is adopted (and in this considerable latitude is permissible), it must not fall short in substantial compliance with the above requirements.

§ **835. No Form Prescribed.**— This is one of those duties enjoined by the law merchant which cannot be safely reduced to rigid formality. To prescribe an inflexible form for notices of this kind, though it might be a matter of convenience in exceptional cases, would in a majority of instances merely serve as a trap to the unprofessional dealer in securities of this sort. For this reason the interests of the trading community are better subserved by enjoining upon the holders of commercial paper, upon which others are conditionally liable, the simple duty of notifying antecedent parties, in case of non-payment or non-acceptance, so as reasonably to apprise them of the dishonor of the paper upon which they are sought to be charged, trusting to the suggestions of common sense for fitting terms in which to convey the information. As free as is this plain requirement from technical abstruseness, it has nevertheless been the subject of earnest dispute and no inconsiderable amount of litigation. It may be instructive, therefore, to note the manner in which the courts, in deciding adjudicated cases, have held as to what is *a substantial description* of the note or bill, and what amounts to *sufficient information of its dishonor.*

§ **836. Immaterial Omissions.**— It has been held in case of the dishonor of a negotiable promissory note, indorsed

[1] *Infra.* See, also, Story on Prom. Notes, § 348, and cases cited.

by the party sought to be charged, that where the notice gave the date and amount of the note, the date of its maturity, the name of the maker, the fact of indorsement, and that it was made payable to such indorser, together with the information that it had been presented at maturity and payment refused, was in all respects a good and sufficient notice, notwithstanding an omission to state the name of the holder in whose interest the notice was given, and notwithstanding, also, that the accrued interest was not mentioned.[1]

§ 837. **Date of Maturity Held Immaterial.**— So it was held that the notice was not defective, merely because it failed to state specifically the date of maturity, it not appearing that there was any other negotiable instrument to which the notice might apply. Had there been any such other paper in existence, that fact could have been shown by the party sought to be charged, and in the absence of such evidence, there was no probability that the party was misled by the omission.[2]

§ 838. **Omission of Name of Payee.**— So also, has it been held, where the name of the *payee* was omitted from the notice, that this would not be regarded as a substantial defect, the description being otherwise sufficiently full and complete to identify the note upon which the party was sought to be charged.[3]

§ 839. **Clerical Error Will Not Always Vitiate.**— A mistake amounting to nothing more than an act of clerical misprision will not always vitiate the notice. As where a notice of dishonor stated that the note was due on a day which was prior to the last day of grace, and also gave the name of the maker as "Jotham Cushing," instead of Jotham

[1] Howe *v.* Bradley, 19 Me., 31. See, also, Mills *v.* United States Bank, 11 Wheat., 431; Davenport *v.* Gilbert, 4 Bosw., 532; Bradley *v.* Davis, 26 Me., 45.

[2] Gates *v.* Beecher, 60 N. Y., 518. See, also, Home Ins. Co. *v.* Green, 19 N. Y., 518, and Youngs *v.* Lee, 12 id., 551. In the latter, held that omission of both date and time of payment was immaterial.

[3] Brooks *v.* Blaney, 62 Me., 456.

Cushman, as it should have been, the court refused to hold, as a matter of law, that these errors were sufficiently important to vitiate the notice; but declared that it was for the jury to decide from the evidence whether defendant, having no other note at the bank, was misled by the mistake. The jury deciding that he was not so misled, the verdict was sustained.[1]

§ 840. **Mere Ambiguities Not Fatal.**—Nor will mere ambiguities, arising from clumsy phraseology in the notice, destroy its effect. As where a notice was in the following form: "December 23, 1871. Please take notice that M. D. S. and C. F. A.'s note, dated Baltimore, September 20, 1871, payable ninety days after date to the order of R. S., for $340, payable at Third National Bank, and by you indorsed, is delivered to me by the cashier of the Western Bank of Baltimore, for protest, and the same not being paid, payment thereof having been demanded and refused, is protested, and will be returned to the cashier, and that you will be held liable for the payment thereof." This was held sufficient notice of presentment and non-payment of the note on the 22d day of December.[2] It will be noticed that the date of the notice is the 23d, and that the delivery to the notary is stated in the present tense. The inference might follow that the demand was made by the party giving notice of that fact, and could not well be made before he received the note. Though the above can hardly be commended as a good model for notices of this kind, yet its deficiencies are so aided by legal intendment that it was held to convey to the party notified, information of the fact that the note was presented on the day it became due according to its tenor and date, as recited in the notice, and that payment was then and there refused. This case is distinguished from Ransom *v.* Mack,[3] where the notice given was a demand of payment on the day following the date of

[1] Smith *v.* Whiting, 12 Mass., 6.
[2] Reynolds *v.* Appleman, 41 Md., 615.
[3] 2 Hill, 587.

the maturity of the note; from Routh *v.* Robertson,[1] where it clearly appeared from the notice that the protest was made before the note was due; from Etting *v.* Schuylkill Bank,[2] and Townsend *v.* Lorain Bank,[3] where the notice was of presentment before the instrument was due.

§ 841. **Must Show Presentment on Business Day.**— But though no particular form of words is necessary, the notice must contain the information that the note or bill has been dishonored. This would not be accomplished by a statement that it was presented and payment refused on the 4th day of July or other legal holiday, although the demand had in fact been made on the day previous. In such a case it was held by the appellate court that it should have been decided by the trial court, as matter of law, that the notice was insufficient.[4]

§ 842. **Signed by One Having Authority.**— So, also, has it been held that a notice given in writing, as coming from the holder of the note, and signed with his name, by one who had neither special nor general authority to give the notice in his behalf, was insufficient for the purpose of charging the indorser to whom the notice was delivered, though it was otherwise in proper form, and was given in the usual time.[5]

§ 843. **Where and How Served.**— The consideration of the question of where and how a notice of this sort may be effectually served, without imposing upon the party giving it the duty of seeing that it is actually received in time, will render it necessary to give the rules applicable respectively to cases where the party giving the notice, and the one sought to be charged, reside or carry on business in the same place; where the party to be charged resides contiguous to

[1] 11 Sm. & M., 382.

[2] 2 Pa. St., 355.

[3] 2 Ohio, 345.

[4] Ransom *v.* Mack, *supra.*

[5] Cabot Bank *v.* Warner, 10 Allen, 522. It must also be directed, on its face, to the one sought to be charged. Remer *v.* Downer, 23 Wend., 620.

the place where the paper is dishonored, or the party subsequent to him in liability, and from whom the notice should come, resides; and where the sender of the notice, and he to whom it is sent, reside or carry on business in different places. The necessity of considering these three classes separately under this division of our subject arises from the fact that they are governed by different rules, both as to the place and the manner of service.[1]

§ 844. **Parties Residing in Same Place.**— Where the party sought to be charged by the notice resides or carries on business in the same city or village where the paper is dishonored, or from whence the notice comes, it should generally be served upon him personally, or, what is regarded as tantamount thereto, delivered at his usual place of abode, or his place of business.[2]

§ 845. **Indorser Temporarily Absent.**— In pursuance of this rule, it was held that where the sender of the notice and the party to be notified resided in the same town,[3] the latter could not be charged by notice sent to him through

[1] Where, at the time the holder received the note, the indorser was known to be an inmate of a certain boarding-house, which he left before the maturity of the obligation, and had embarked for Europe; but, on inquiring for him, for the purpose of notifying him of the dishonor of the note, the holder was informed by the proprietor of the house that he was still boarding there, it was held that notice left for him at the boarding-house was sufficient. McMurtrie *v.* Jones, 3 Wash., 206. Personal service is good wherever it may be effected. Foster *v.* McDonald, 5 Ala., 376; Bank of U. S. *v.* Corcoran, 2 Pet., 121; Gilchrist *v.* Donnell, 53 Mo., 591; Shelburne Nat. Bank *v.* Townsley, 107 Mass., 444.

[2] Williams *v.* Bank of U. S., 2 Peters, 96; Timms *v.* Delisle, 5 Blackf., 447; Bowling *v.* Harrison, 6 How., 248; Bussard *v.* Levering, 6 Wheat., 104; Nashville Bank *v.* Bennett, 1 Yerg., 166; Boyd *v.* City Sav. Bank, 15 Gratt., 501; Pierce *v.* Pendar, 5 Metc., 352; John *v.* City Nat. Bank, 62 Ala., 529.

[3] The word "town" used here is intended to signify about the same thing as is understood by "village" in those portions of the country where the counties are divided, for purposes of local government, into *towns*, which answer, as nearly as may be, to the *townships*, and perhaps *parishes*, of other sections, where town is understood to mean substantially the same as village.

the post, and directed to him at the place where he was then sojourning, he being temporarily absent from home.[1]

§ 846. **What Constitutes Place of Business.**— So, where the indorser lived at board in the city of Bangor, and was frequently absent from home attending to his business, but had a place in the counting room of a business firm of the same city, where he usually transacted business when not absent, and this was all the place of business he had, it was held that, in contemplation of law, he had both a place of business and a residence in Bangor, at either of which a notice should be left for him in order to fix his liability upon the contract of indorsement, provided he was not personally notified in time elsewhere.[2]

§ 847. **Where Residence Known.**— So, also, where the holder of a note which had been duly presented, and payment refused, resided in the city of New York, and the indorser was also a resident of the same city, but lived at Kip's Bay, some three and a half miles from the postoffice, and the holder knew where such indorser lived, it was held that a notice inclosed in a letter and deposited in the postoffice of the city was not sufficient to charge the indorser, in the absence of any proof that the same was received by him on the day following the date of dishonor. In deciding this case, stress was laid upon the fact that the carriers did not carry letters to Kip's Bay, which at that time was about one mile beyond the compact portion of the city where letters were usually delivered.[3]

§ 848. **By Post, Delivery Must be Proved.**— The same case was again before the same court under a somewhat different aspect. At the second trial it appeared that the

[1] Wilcox *v.* McNutt, 2 How. (Miss.), 776.

[2] Pierce *v.* Pendar, 5 Metc., 352. See Brindley *v.* Barr, 3 Harr. (Del.), 419; Shelburne Falls Bank *v.* Townsley, 107 Mass., 444; Gilchrist *v.* Donnell, 53 Mo., 591; Nevius *v.* Bank of Lansingburgh, 10 Mich., 547; Smedes *v.* Utica Bank, 20 Johns., 371; Sheldon *v.* Benham, 4 Hill, 129; Todd *v.* Edwards, 7 Bush, 89; Neal *v.* Taylor, 9 id., 380.

[3] Ireland *v.* Kip, 10 Johns., 489. See, also, Bowling *v.* Arthur, 34 Miss., 41; Bowling *v.* Harrison, 6 How. (U. S.), 248.

indorser had given orders at the postoffice to have his letters left at a certain house on Frankfort street, where he called or sent for them every day. But it was still held that the notice was insufficient unless it was proved that the letter containing it was actually delivered at the house on Frankfort street on the day following that on which payment was refused.[1]

§ 849. **Different Meaning of the Word Town.**— The general test as to whether the situation of the parties is such that information of the dishonor of the paper may be communicated by mail, so as to affect the party notified whether he receives the notice or not, is their respective places of residence. In some of the cases the notice is required to be personal, or at the usual place of abode or place of business of the party notified when they reside in the same town; while in other cases communication by mail is expressly upheld between fellow-townsmen. The conflict between the decisions in these cases is more apparent than real. The difference arises from the fact that in some of the states the word "town" has a different signification from that given it in others — the rule being substantially the same. In those states where postal communication is inhibited between residents of the same town, the word is used synonymously with "village." It means a collection of houses, or is intended to distinguish town from country. While in those states where the courts favor this means of communication between those residing in the same town, the word is used to designate a division of the county which may include no urban population at all, and frequently has several postoffices. In New England, and some of the older states, a town may include several villages, and correspond to what are elsewhere, particularly in the West, called townships.

§ 850. **By Post Between Different Villages in Same Town.**— It is accordingly held that the post is the proper

[1] 11 Johns., 231.

means of communication between residents of different villages in the same town, where such villages have separate and distinct postoffices.[1]

§ 851. **Leaving at Place of Residence or Business.**— A notice duly delivered at the last known place of residence, or place of business, of a party to a bill or note who has absented himself from his usual place of abode, will be as effective as though it were personally delivered to the one for whom it was intended.[2] Were the rule laid down differently, it would afford a convenient facility for the evasion of liability by one who had assumed the conditional obligation of indorser. If, by simply absenting himself from his home, he might cast upon the holder the *onus* of tracing out his whereabouts in order to serve him with notice of dishonor of the paper, the temptation to evade such unwelcome intelligence would be too strong for the powers of resistance of a large majority of the trading community.

§ 852. **Residence in One Place, Business in Another.**— Simple and reasonable as the rule seems, requiring personal notice to resident parties, and fair and liberal as the provision appears allowing service at the place of business or the residence of the party to be notified, at the option of the holder, the very latitude of construction which has arisen from necessity, and been prompted by experience, has had the effect, in some instances, to surround the administration of the law with additional complications and difficulties. It not unfrequently occurs that the residence of the party and his place of business are in separate and distinct places, and one or the other of such places may be where the note or bill is dishonored. Such was the fact in the case of Van Vechten *v.* Pruyn.[3] The note was payable in Catskil, where the indorser resided with his family, but his place of business was in the city of New York, where

[1] Ransom *v.* Mack, 2 Hill (N. Y.), 587; Shaylor *v.* Mix, 4 Allen, 351.
[2] Jones *v.* Mansker, 15 La., 51; Stedman *v.* Gooch, 1 Esp., 3.
[3] 13 N. Y., 549.

he spent four days of the week, and received some of his letters. Notice of the non-payment of the note was sent to him inclosed in a letter deposited in the postoffice at Catskil, and addressed to him at his place of business in New York. It was held insufficient, for the reason that notice should have been left at his residence in Catskil, even though that mode of service might have involved delay in conveying the necessary information. That such delay would necessarily have followed, can scarcely be doubted, yet the decision is in strict conformity to a rule established for the mutual protection and convenience of the parties, and one which in this instance the holder would have best consulted his own convenience, as well as his own security, by following.[1]

§ 853. **"Place of Business" and "Residence," and What Amounts to Leaving Notice at Either.**— The courts have found it necessary to indicate what was meant by the residence and what by the place of business of the indorser or drawer. They have likewise judicially determined what amounted to a service of the notice by leaving it at either the residence or place of business.

§ 854. **Residence.**— In designating the residence as the proper place for such service, it was not intended to restrict the party notifying to the *private* residence of antecedent parties, for the manifest reason that they might be residents of the city, town or village, and still have no private residence, in the popular sense of the term, either there or elsewhere. What is commonly understood by the residence of a person within a city, is his private mansion or house occupied by himself and family exclusively. It would be extremely absurd, as well as embarrassing to the courts, to give the term used in this connection such a restricted meaning. It might render utterly impracticable the proper notification of any but householders, except where the notice was delivered to them in person. The liberal and rational

[1] Curtis *v.* State Bank, 6 Blackf., 312.

construction given to the term is illustrated to some extent in the case of Pierce *v.* Pendar.[1]

§ 855. **Need Not be Domicile.**— It has also been held that for a party to be a resident within the meaning and contemplation of the law merchant, it is not necessary that he should be domiciled in the same place — nor even that he should be domiciled at all. It was held sufficient to bring the place within the meaning of the law that it was the place of abode at the time, and an instruction to the effect that, in order to constitute a house the place of residence of the occupant, it should be where he was domiciled, was declared to be erroneous.[2] But it would seem where a party to a bill or note has his domicile in one place and his residence in another, that notice left at either within a reasonable time will be sufficient to satisfy the law.[3]

§ 856. **Leaving Notice at Residence.**— In one case, however, where the notary who gave the notice, upon calling at the residence of the party for that purpose, met a boy in the door-yard, who said he was the indorser's son, to whom he gave the notice, with the request that he would hand it to his father, and afterwards saw him approach the house with the notice, but did not see him enter, such service was held insufficient to charge the indorser.[4] In this case the mere leaving the notice in the hands of one about the house, without being able to show even that the message was taken within, much less that it actually came to the hands of the one for whom it was intended, was not such a leaving it at the residence of the party as the law enjoins.

§ 857. **Leaving Notice at Boarding House.**— The rule as above laid down seems to bear more harshly upon the holders of dishonored commercial paper than that declared in the case of Bank of United States *v.* Hatch,[5] where the

[1] *Ante*, § 846, note.
[2] Young *v.* Durgin, 15 Gray (Mass.), 264.
[3] Merz *v.* Kaiser, 20 La. An., 577.
[4] Adams *v.* Wright, 14 Wis., 408.
[5] 1 McLean, 90; S. C., 6 Peters, 250.

indorser was living in lodgings at a public boarding-house, and the notary called and inquired of another boarder, by whom he was informed that the party was absent, whereupon the notice was delivered to such other boarder, and he was requested to hand it to the absent indorser on his return. This was held a sufficient service of the notice, whether, as a matter of fact, it was received by the person for whom it was intended or not.

§ 858. Leaving at Counting House with Pretended Agent.— So, also, was a service held sufficient which consisted in leaving the notice at the counting-house of the party to be notified, with one who represented himself as his agent, notwithstanding it subsequently transpired that the representations of the pretended agent were utterly false, and he was not authorized, either generally or specially, to represent his alleged principal in that or any similar transaction.[1]

§ 859. Will Not Suffice to Leave Near the Place.— But there can hardly be said to be a conflict between the two cases last cited and that of Adams *v.* Wright.[2] The difference of conclusion reached seems to emphasize the importance of a strict compliance with the requirement to deliver the message at the place of residence or business, and that the law will not be satisfied by merely leaving it in proximity thereto, when the omission is the result of carelessness or indifference on the part of the messenger who has the notice in charge. In the two cases cited above, from which are taken the illustrations of a liberal construction of the provision in favor of the holder of the paper, there was an appearance of the utmost diligence compatible with the peculiar circumstances and surroundings of the parties. Any failure of the indorser to receive the notice in time, in either case, was the result of his absence from his place of residence or business, and in leaving it in the one case with the fellow boarder, or in the other with the pretended agent,

[1] Jacobs *v.* Turner, 2 La. An., 964.

[2] *Supra*, § 856.

messenger availed himself of the means which presented the strongest likelihood of accomplishing the desired end. A well defined departure from the rule as to where the notice should be left, when it is not personally served upon a resident party, would be fraught with considerable hazard to the rights of indorsers and drawers, for the reason that where it is once admitted that a notice which is constructive in its nature may be legally served by a deposit elsewhere than at such places as the party to whom it is directed habitually attends, the extent of the departure will become a mere question of caprice. It is better to be governed by a rule which may occasionally work harshly than to be without any rule at all.

§ 860. Illustration of Same Principle.— So where an indorser of negotiable paper was carrying on business in the third story of a building occupied by numerous other persons, between whom and himself there was no business connection or relation other than that of neighborhood, it was held that such a notice could not be properly served by leaving it on one of the desks of an office in the second story of the same building.[1]

§ 861. Corresponding Number Not Sufficient to Identify.— So, also, has it been held not to be a sufficient proof of service, that the notice was left at a building with a number corresponding to the number of the house mentioned on the bill, as the residence or place of business of the indorser.[2]

§ 862. Several Places of Business, Either Will Suffice. But where the indorser or drawer carries on business at several distinct places in the city or village in which the note or bill is payable, in case of non-acceptance or non-payment, notice may be properly served at either one of such places of business without the holder being required

[1] Kleinmann *v.* Boerstein, 32 Mo., 311.
[2] Davenport *v.* Gilbert, 4 Bosw., 532.

to determine at which of them there would be the greatest likelihood of finding the party at any particular time.[1]

§ 863. Holder May Elect Between Place of Business and Residence.— When the party to be notified both resides and carries on business in the same place where the note is dishonored, it seems that the holder is unrestricted in his choice of methods of making the service. It may with equal propriety be served at either the residence or the counting-room, by leaving it in the hands of some one who is apparently, at least, in charge of the place, or member of the family, or in some manner connected with either the household or the business affairs of the party. And when it is impracticable to leave the notice with any one sustaining intimate relations toward the one to whom it is addressed, it may, as we have seen, be served with equal effect by leaving it with a stranger.

§ 864. May be Left When No One There to Receive it. And when there is not even a stranger at the place where the drawer or indorser is sought, with whom the notice may be left, be it at his residence, or his place of business, the written message may be deposited there, and by being so left, will charge the party as effectively as though it had been delivered into his own hand.[2] But where there is an omission to leave the notice with any one, the reason for such omission should probably be given.[3]

§ 865. At Business Place, Must be on Proprietor.— It is not sufficient to constitute the counting-room, office or shop, the place of business of the party to be charged with notice, that he regularly transacts business there. It must be *his* place of business, in the sense that he has a proprietary interest in the subject of the transactions, or in the proceeds of the business there conducted. Notice left at a business house for one of its clerks or other employees

[1] Phillips *v.* Alderson, 5 Humph. (Tenn.), 403.
[2] Commercial Bank *v.* Gove, 15 La., 113.
[3] Davenport *v.* Gilbert, *supra*, § 861.

would not bind him unless it came to his own hands in due time.[1]

§ 866. Office of Directors of Corporation.— It has also been held that the president of a private corporation could not be notified constructively by leaving notice of the dishonor of commercial paper drawn or indorsed by him, at the office of the board of directors over which he presided, unless there was some special authority to serve the notice in that manner.[2]

§ 867. Case Distinguished from Above.— This case is to be distinguished from that of Berridge *v.* Fitzgerald.[3] The latter was where the indorser of a bill was one of the directors of a corporation. He had no other place of business and was engaged in no other occupation than that of director. He was at the company's office when he indorsed the bill, which was regular business paper, and had been accepted by the company. When the instrument was dishonored, the affairs of the corporation were being wound up, and the holder did not know where the indorser resided. Accordingly, he sent the notice to him at the company's office, and such service was held sufficient, though it was never actually delivered into the hands of the one for whom it was intended.

§ 868. Difference in Time at Residence or Business Place.— It is also well to bear in mind, in this connection, that there is a difference between the methods of serving notice at the residence of the party and at his place of business. In the former it is sufficient if the notice is delivered at any time previous to the hour of retiring for the family, while in the latter it should be delivered during the ordinary business hours of the day.[4]

§ 869. By Mail Between Residents of Same Place.— But the rule requiring personal notice, or by leaving it at

[1] Bank of West Tennessee *v.* Davis, 5 Heisk. (Tenn.), 436.
[2] Commercial Bank *v.* Strong, 28 Vt., 316.
[3] 4 Q. B., 639.
[4] *Ante*, III, §§ 788, 789.

the place of business or the residence of the party notified, where the parties are residents of the same place, is by no means universal. Although it is still maintained in many of the states of the Union, in many others and in England it has been materially modified. One of the reasons assigned for the inhibition of the post as a means of communication between residents of the same place was, that as there was no postage charged upon drop letters, the government did not assume the same degree of care of mail matter of this sort as of letters transmitted through the mails for compensation. This reason is hardly satisfactory. Probably the better one is, that where the notice is deposited in the post-office, its receipt in time depending upon the promptness with which the drawer or indorser calls for the letter, is much less certain than sending it directly to the residence or place of business of the party, or delivering it to him in person on the day following the date of non-payment. Whatever may have been the influence of either or both of these causes in bringing about the original adoption of the rule, the changes wrought in our postal system, particularly within a few years past, have entirely disposed of the one, and greatly modified and limited the effect of the others.

§ 870. **Letter Carriers.**— Since the adoption of the free delivery system, by which mail matter is delivered by letter carriers in all the large cities and towns of this country, the change has suggested an entire abrogation, in those places where carriers are employed, of the rule that obtained under the old system, and the adoption of the more convenient rule, that even as between residents of the same place, where letter carriers are regularly employed, it shall be sufficient proof of service to show that the notice was inclosed in a letter duly stamped, and addressed to the drawer or indorser at his residence or place of business, and deposited in the postoffice in time for regular delivery on the day the party would be entitled to personal notice.[1]

[1] Shoemaker *v.* Mechanics' Bank, 59 Pa. St., 79; Walters *v.* Brown, 15 Md., 292.

§ 871. **Drop Letters Required to be Stamped.**— In the case of McNatt *v.* Jones,[1] the fact that, by the law of congress, letters deposited for local distribution are required to be stamped, is regarded as sufficient to justify an abandonment of the rule requiring personal notice in places of the magnitude and importance of Augusta, Georgia.

§ 872. **Penny Post.**— For purposes of giving notice of the dishonor of negotiable instruments, the penny post has for some time been regarded as a proper and legal means of communication in the city of London and other large cities in Great Britain.[2]

§ 873. **Baltimore and Other Large Cities.**— It was also decided in the case of Walters *v.* Brown,[3] that in large cities, like Baltimore, where letter carriers were employed, and the parties entitled to notice were accustomed to receive letters from such carriers, the rule requiring personal notice did not apply. It was held, in that case, that a notice regularly posted in time for delivery in the ordinary course of mail, and properly addressed to the party, would as effectually charge him with notice of the demand and non-payment of the paper upon which he was liable as though such notice had been personally served or left at his business place. Other cases have recognized the penny post, or the postal delivery system, as absolving the holder from the duty of employing a special messenger, in order to render the receipt of the notice certain between residents of the same place.[4]

§ 874. **Established Custom of Bank.**— And even where the carriers are not employed, resident parties may be notified by means of a letter deposited in the postoffice, and the fact that such notice was so deposited, properly addressed, will be sufficient to charge the party with notice,

[1] 52 Ga., 473.

[2] 2 Daniel on Negot. Inst., § 1010.

[3] 15 Md., 285.

[4] Brindley *v.* Barr, 3 Harrington (Del.), 419; Bell *v.* Hagerstown Bank, 7 Gill, 216.

whether he receives it or not, when such mode of service is in accordance with an established custom of the bank, of which custom the party notified was cognizant.[1]

§ 875. **May be Sent by Post When Authorized by Indorser.**— So when the indorser has expressly authorized any one in whose hands the note may be when dishonored, to send the notice by post, though a resident of the same place, the notice may be served in that manner with the same effect as when the parties reside at a distance from each other. But such words as "Third indorser, J. P. H., lives at Vicksburg," written upon the instrument, were held not to amount to an agreement on the part of J. P. H. to receive notice of dishonor through the Vicksburg postoffice, when that was the place where payment was refused by the maker, and also the place of residence of the party sending the notice.[2]

§ 876. **Parties Living Near Place of Dishonor.**— Generally where the party to a bill or note, whose liability is sought to be fixed by notice, lives in the neighborhood of the city or village where the instrument is made payable, and it is presented, and acceptance or payment refused, he may be notified by a drop-letter, deposited in the postoffice where the instrument is dishonored, it being the nearest office to the party notified, or the one at which he usually receives his letters.[3]

§ 877. **Illustration of Same.**— So, where the holder of a note resided in Georgetown, District of Columbia, and the indorser lived in the country, with his nearest postoffice, and the one at which he usually received his letters, at Georgetown, the note being presented for payment in that city, and payment refused, a notice of such non-payment, inclosed in a letter and addressed to the indorser at Georgetown, was

[1] Lime Rock Bank *v.* Hewett, 52 Me., 51.

[2] Bowling *v.* Harrison, 6 How. (U. S.), 248.

[3] Bondurant *v.* Everett, 1 Metc. (Ky.), 658; Barret *v.* Evans, 28 Mo., 331; Bell *v.* State Bank, 7 Blackf., 456; Jones *v.* Lewis, 8 Watts & Serg., 14.

held sufficiently served, because, to have compelled the holder to incur the expense of the employment of a private messenger, under the circumstances, would have been unreasonable.[1]

§ 878. **Partners — One Resident, One Non-resident.**— An exceptional case, where the manner of notifying country indorsers is fully approved, is that of Hume *v.* Watt.[2] In this case there was an indorsement by two partners, one of whom lived in the country, in the vicinity of the city where the note was dishonored, and received all his mail matter at the city postoffice; while his co-indorser was a resident of the city, and, as such, entitled to personal notice. As it was partnership paper, notice properly served upon either was sufficient to bind both. The only service made was upon the one who resided in the country, and that by a drop-letter deposited in the postoffice of the place of dishonor. The notice was held insufficient, for the reason that it should have been personally served upon the indorser who resided in the city.[3]

§ 879. **Case Requiring Personal Notice to Country Indorser.**— The recognition of the sufficiency of notice by means of drop-letters, to those who reside *near* the place of dishonor, and receive their letters at that postoffice, is so general as to be almost universal. But it has been held that the postoffice is not only not the proper place to deposit notice, when the indorser resides in the same town with the party giving the notice, but that it is equally objectionable when the indorser lives close to the border of the town where the letter containing the notice is posted.[4]

§ 880. **Indorser Three Miles Distant.**— The residence of the indorser being indicated as "close to the border" of

[1] Bank of Columbia *v.* Lawrence, 1 Pet., 578.

[2] 5 Kan., 34.

[3] The principal reason assigned by the court for thus holding was that there was not a proper degree of diligence shown in making inquiry for the resident indorser.

[4] McCrummen *v.* McCrummen, 5 Martin (La.), N. S., 158; Laporte *v.* Landry, id., 359.

the town, it might be inferred that personal notice was insisted upon because the indorser was substantially a resident of the town — only separated therefrom by an imaginary line. But a subsequent case, by the same court,[1] is calculated to correct any such impression. In that case the indorser resided two or three miles from the town where the letter was posted, and where he generally received his mail matter, but it was held that notice deposited in such postoffice was not properly served, but should have been delivered to him by a private messenger.

§ 881. Party Resident at a Great Distance from Postoffice.— The mere fact that the party to be notified resides in the country does not always justify the employment of the mail as a means of communicating the fact of dishonor. He may reside so far beyond the limits of the city or village as to be inaccessible by that means. As where a party resides thirty or forty miles distant from any postoffice. In such a case, it was held that the notice must be delivered to him in the same manner as though he resided within the limits of the place where the note was payable.[2] And that the holder should commence exercising diligence in reaching the indorser on the day following that upon which the note was dishonored, and continue, without unnecessary intermission, until the party was notified.

§ 882. Parties Residing Near Different Post Towns.— Where the party sending the notice and the one to be notified resided at a distance from each other — in or near different cities, towns or villages,— notice by the post is not only sufficient, but it is, as a general rule, the safest and best means of notification which can be adopted. And where it is proved that the holder, or party giving the notice, has deposited a letter containing the same in the postoffice, properly addressed, that is sufficient to charge the party notified, though the letter never should come to hand.[3]

[1] Louisiana State Bank *v.* Rowel, 6 Martin (La.), N. S., 506.

[2] Fish *v.* Jackman, 19 Me., 467.

[3] Lindenberger *v.* Beall, 6 Wheat., 104; Munn *v.* Baldwin, 6 Mass., 316; Shed *v.* Brett, 1 Pick., 401.

§ 883. **Office to Which Party Usually Resorts.**— Generally the notice should be sent to the postoffice nearest to the party notified, but this is not an inflexible rule. The object of the law being to communicate the knowledge within a reasonable time, that the instrument has been dishonored, it will be sufficient if the notice is sent to the office to which the party usually resorts for his letters.[1]

§ 884. **General Adoption of Service by Mail.**— No little controversy has arisen, and some contrariety of opinion has been expressed by the courts, in construing the requirements of the law in regard to the postoffice to which the notice of dishonor should be sent in cases pointed out by precedent as proper ones for service by that mode. Where, however, it could be ascertained that there was a postoffice reasonably near the residence of the party notified, at which he was accustomed to receive his letters, the cases have been rare indeed where it was held that any other mode of service than that by mail should have been employed.

§ 885. **Exceptional Case.**— However, the case of Nashville Bank *v.* Bennett[2] seems to ignore the rule followed elsewhere, and to set up a standard, to attempt to follow which would lead to endless confusion. The defendant was indorser of a note payable at a bank in Murfreesboro. Payment being refused at maturity, notice of protest was placed in the postoffice, addressed to the indorser, and directed to Jefferson in the same county, where a postoffice was kept, and about two and a half or three miles from which the indorser resided. His residence was eleven miles from the place of dishonor, and Jefferson was his nearest postoffice. There was no evidence showing whether or not he was in the habit of receiving his letters there. The court, however, seemed to take judicial notice of the fact

[1] Tims *v.* Delisle, 5 Blackf., 447; Reid *v.* Payne, 16 Johns., 218; Remer *v.* Downer, 23 Wend., 620; Bank of Geneva *v.* Howlett, 4 Wend., 323; Hazleton Coal Co. *v.* Ryerson, 20 N. J. L., 129; Bank of Columbia *v.* Lawrence, 1 Pet., 578.

[2] 1 Yerg. (Tenn.), 166.

that Murfreesboro was a more important trading point than Jefferson, and so held that the notice was not well served, but should have been delivered to defendant in person, or left at his domicile or place of business, and even seemed to intimate that it would have been better to have directed the letter to the indorser at Murfreesboro. The reasons assigned for deciding the case in this manner were that "the means or mode adopted of giving the notice was not the best reasonably within the power of the party giving it; but a mode circuitous, doubtful in effect, and overlooking without necessity the best kind of service, to wit, personal service."[1]

§ 886. **Necessity of a Rule.**— It would be rather a capricious rule to require a holder of commercial paper, in every instance, to choose what was absolutely the best mode of serving a notice of dishonor. It would be unjust to compel him to exercise his independent judgment in selecting one of several modes, and then make no allowance for his good faith in case his judgment should prove erroneous. It would surround transactions in negotiable instruments with such hazards as few would be willing to assume, to impose upon an innocent indorsee in whose hands the instrument happened to be when payment was refused, not only the duties of good faith and diligence in notifying the indorser upon whom he relied, but to require him, at his peril, to exercise the dangerous discretion of electing which mode of notification he would adopt, and then hold that discretion subject to review by a court, hampered by no fixed rule of preference for one mode of giving notice over another. To hold simply that the best mode "reasonably within the power of the party giving it" must be adopted is to abandon all rules by which the best mode may be determined, and leave it entirely at the discretion of the giver of the notice. The logical corollary of such a deduction would be that this

[1] In considering the above decision one cannot avoid the conclusion that there must have been in possession of the court, a knowledge of some facts that could not properly appear in the evidence.

discretion, once exercised, could only be impeached for *mala fides*.

§ 887. **Different Offices in Same Town.**— One of the features of what may be regarded as the rule by which parties giving these notices are governed is fairly illustrated by the case of Roberts *v.* Taft.[1] There the notice was seasonably sent by mail to the indorser, directed to T., the principal postoffice of the town in which he lived. But the indorser resided, and usually received his letters at, West T., another postoffice in the same town. The holder, by whom the letter containing the notice was sent, knew where the indorser lived, and also knew that there was a postoffice at West T. Under these circumstances it was very justly held that by the delay the indorser was discharged from liability.

§ 888. **General Direction to Town Prima Facie Sufficient.**— But where there are two postoffices in the same town it is not always necessary to direct the letter containing the notice to one in particular. A general direction to the town is *prima facie* sufficient, and will serve to charge the party notified, unless he is accustomed to receive his letters at a particular office, of which the sender of the notice was aware, or might have learned upon reasonable inquiry.[2]

§ 889. **Private Messenger.**— Though the usual, and in general the preferable, mode of notifying antecedent parties to a bill or note, of the dishonor of the instrument, where such parties reside elsewhere than in the city or village in which payment is refused, is by mail, yet there is no imperative rule requiring the adoption of that mode. A private messenger may be sent with the message, provided the employment of this means involves no material delay, and, even where the notice arrives a little later in the same day than it would by post, it may still be sufficient. As where the first indorser resided in Liverpool, and a subsequent indorser in Manchester, the bill being dishonored, notice thereof was duly received by the subsequent indorser

[1] 120 Mass., 169.

[2] Morton *v.* Westcott, 8 Cush., 425.

on the 24th, and on the same day was sent by a special messenger to the Liverpool agent of such subsequent indorser. It arrived at Liverpool on the 25th. The ordinary business hours for merchants were as late as 8 or 9 o'clock in the evening, and the agent of the Manchester party called upon the Liverpool indorser about 6 o'clock, P. M., of the day on which he received the notice, but found no one at his counting-house with whom the notice could be left. The 26th was Sunday, and the first indorser did not actually receive notice until the 27th. This was held sufficient to charge him, because the subsequent indorser had used due diligence, and was not required to lay aside all other business in order to notify the antecedent party at the earliest possible hour of the day; but he had done all that was incumbent upon him by sending the notice so that it arrived on the day following that upon which payment was refused in time for delivery during business hours.[1]

§ 890. **Addressed to Residence or Business Place When Known.**— But the service of notice by mail is, as we have seen, much the better for the party giving it, both as to safety and convenience, where the parties reside apart at such a distance as to authorize notification through the post; yet, in sending a communication of this kind, care should be taken to direct to the party to be notified at his place of residence or business, if either be known, or to the postoffice nearest such residence or place of business. It will not suffice that it is sent to the office where the party may be found, unless it comes promptly to hand or is sent to the place designated in the bill or note.[2]

§ 891. **Must be Addressed to Place of Business.**— So where a note was made in Cincinnati, payable generally, and the indorser resided in Indiana, but when the note matured was in the city of Washington, D. C., notice sent by the post to him at the latter place was held not well served.[3]

[1] Bancroft *v.* Hall, 1 Holt (N. P.), 476.

[2] Story on Prom. Notes, § 343 *et seq.*

[3] Burrows *v.* Hannegan, 1 McL., 309.

§ 892. Indorser May be Notified at Place He Pretended to Reside.— But when the indorser holds himself out to the world as resident at a particular place, in case of dishonor of the instrument indorsed by him, and notice is regularly sent to such pretended place of residence, he will be estopped to deny that it is his true place of abode, though he, in fact, resides elsewhere, and the party giving the notice has made no particular inquiry in order to learn whether he lived at the place to which the notice was directed or not.[1]

§ 893. Exception to Cases Where Mail Most Convenient Mode.— A very obvious exception to the cases where notice must be sent by mail to the place of residence of the party to be notified, or even where such would be the most prudent or expeditious mode, would be where, at the time the paper goes to protest, circumstances have rendered personal notice quite as convenient as notice by mail. As in the case of Miles *v.* Hall,[2] where the indorser was temporarily at the place of payment, lying ill at the house of the notary who undertook to serve the notice. It would have been sufficient to charge him with notice, to have communicated the facts by means of a letter directed to him at his residence; but the notary undertook to serve the notice personally, which he did by entering the sick room of his guest, and while there informed him of the contents of the written notice, which he placed upon the mantel-piece. The court held that the notary proceeded properly in giving personal notice, which was always the best, and in this instance was given in the most effectual mode practicable under the circumstances.

§ 894. When Holder May Choose Between Places.— In those cases that seem to be the best considered, the most consistent with each other, and in harmony with the doctrines of the law merchant, the giver of the notice is not required to discriminate with nicety between places, when there are several which seem to be equally available. As

[1] Lewiston Falls Bank *v.* Leonard, 43 Me., 144.

[2] 12 Sm. & Marsh., 332.

when the party to be notified resides in two or more places alternately; or when he resides in the country, and receives his letters from two different offices, without seeming to give a decided preference to either; or when he resides near one postoffice and carries on business in the neighborhood of another, receiving his mail matter sometimes at the former and at other times at the latter.[1]

§ 895. **Illustration of Above.**— In one case, where the party resided and carried on business in separate places, at each of which there was a postoffice, and he had a box at the one in the village where he carried on business, though he received occasional letters at the other, it was held that a notice sent to the one where he had a box, and where he conducted his business, was properly served.[2]

§ 896. **Contra.**— But in another case, it was decided, where there was evidence that the indorser received letters by mail at two separate offices, at one of which he had a box, that notice was not properly served when directed to the office where he had the box, because the other was nearest his residence.[3] Outside of the jurisdiction where this case was decided, the courts would hardly be inclined to adopt it as an authority, for the reason that it gives undue importance to the matter of distance.

§ 897. **Distance Made the Governing Fact.**— In still another case, by the same court, however, the lines are drawn with even greater strictness.[4] There the indorser to whom notice was sent resided in the parish of C., in which there was no postoffice; so he received his letters at N. and R., as it happened, without seeming to prefer either. The case was allowed to turn entirely upon the question of contiguity. The letter containing the notice was addressed to the indorser at N., and the distance from the residence of

[1] *Infra*, § 895 *et seq.*

[2] Montgomery County Bank *v.* Marsh, 7 N. Y., 481.

[3] Mechanics' & Traders' Bank of New Orleans *v.* Compton, 3 Rob. (La.), 4.

[4] Nicholson *v.* Marders, 3 Rob. (La.), 242.

the indorser to N. and R. respectively was so nearly the same as to require the testimony of witnesses to determine which was the nearer of the two. So trifling was the difference of distance, in fact, that the witnesses called by the parties to settle the important point failed to agree — some swearing in favor of N., and others declaring quite as positively for R. The matter being thus evenly balanced, the court held that R. was the postoffice to which the notice should have been sent, because *the greatest number of witnesses said that it was nearest to indorser's house*, and therefore the indorser was discharged for want of notice.[1]

§ 898. **Criticism of Foregoing — True Rule.**— It is difficult to determine which of the two cases last cited is most at fault. If the latter is open to criticism for adopting the most arbitrary and unsatisfactory rule of evidence, in order to settle a question of no value in determining the rights of the parties, with no better end to subserve than the discharge of a party from a just obligation, the former, by deciding the same question upon evidence of a higher grade, established the bad precedent. In deciding the latter case, the court found itself trammeled by the rule already declared, and could not feel justified in regarding the fact that the party received his letters from both offices alike, as of any special significance, when the precedent case put the same state of facts aside, because there was another office nearer at hand than the one to which the notice was sent. The true rule, both upon principle and authority, is that the notice is sufficiently served, in respect to the postoffice to which it is addressed, if sent to that one which is nearest to the residence of the party notified, *or* at which he ordinarily receives his letters. The citation of these cases, however, may be justified upon the ground that they illustrate

[1] To follow this case as a precedent might seriously embarrass the holder of dishonored commercial paper. In exceptional cases, like the above, it would probably be less expensive to serve the notice personally than it would be to ascertain beyond peradventure which one of two or more offices was nearest the residence of the party to be notified.

the subject here treated, by showing what is not the law. In this way, if no other, they may become useful.

§ 899. **To Principal Office of Parish.**— But where the notice was addressed to an indorser at the principal post-office of the parish in which he had his residence, it was held *prima facie* sufficient, and cast upon such indorser the burthen of showing in defense that there was another post-office nearer to his residence.[1]

§ 900. **To County Seat.**— So it was held when the notice was directed to the county seat of the county in which the party resided, designating the particular locality in the county, that it was properly sent, though the county seat was nine miles from the residence of the indorser, and there was another office within half a mile of his house.[2]

§ 901. **To Principal Office of Town.**— So, also, has it been decided, that though there were several postoffices in the town in which the indorser had his residence, a letter containing the notice addressed to the town postoffice was sufficient, notwithstanding one of the other offices was nearer his residence.[3] This case seems to go to the very extreme of liberal construction in order to preserve the liability of indorsers of commercial paper. It is maintained that the holder residing in a different town is not supposed to be able to learn at which of several postoffices the indorser receives his mail, so he is not required to inquire further than for the town at which the indorser resides.[4]

§ 902. **Should be Inquiry Made.**— The case cited above declares the doctrine more broadly than will be sustained by the weight of authority. In many instances, no doubt, notice sent to a drawer or indorser, directed to the town where he resided, would be sufficient, even though there are other offices in the same town; but the holder would not be justified in sending such notice without the slightest

[1] Yeatman *v.* Erwin, 5 La., 264.
[2] Weakly *v.* Bell, 9 Watts, 273.
[3] Bank of Manchester *v.* Slason, 13 Vt., 334.
[4] *Ibid.*

inquiry, and would certainly not be protected if he knew that there were several offices in the same town, and had cause to believe that reasonable inquiry would enable him to discover at which one the indorser would be most likely to receive a communication by mail. It is true that notice directed to the town, generally, is *prima facie* sufficient, but its sufficiency may be rebutted by proof that the indorser received his letters at one office in particular, and that the holder might have ascertained this fact by proper inquiry.[1]

§ 903. Proper Inquiry for Residence in Another Town. So, in one case, the notary who had protested the note inquired of the cashier of the bank by which he was employed for the residence of the indorser, and was told that it was H. This was a town in which there were two postoffices, one of which was situated at North H., about three miles nearer the residence of the indorser than the other, and was the office at which he usually received his letters. The notary was not aware of these facts, nor that there were two post-offices in the town of H., but sent the letter containing the notice directed to the town, generally, and the court held this sufficiently served to bind the indorser.[2]

§ 904. Sufficient Inquiry Question for Jury.— It has been decided, where the notice was addressed to the town generally, and there were several postoffices in the town, that it was a question for the jury whether sufficient care was exercised in forwarding the notice, to render it effective and binding upon the party notified.[3] Between inhabitants of the same town, but different villages, as we have already seen,[4] the notice may be sent by mail.[5]

§ 905. Transient Indorser.— When the indorser resides alternately at two places, going from one to the other,

[1] Morton *v.* Westcott, 8 Cush., 425; Downer *v.* Remer, 21 Wend., 10; Roberts *v.* Taft, 120 Mass., 169.

[2] Cabot Bank *v.* Russell, 4 Gray, 167.

[3] Downer *v.* Remer, 21 Wend., 10.

[4] *Supra*, § 850.

[5] Ransom *v.* Mack, 2 Hill, 587.

notice directed to him at either, will, in general, be sufficient.[1] So, when the indorser had no fixed place of residence, and the bill was dated at a hotel, proof that the notice was sent to such hotel, and received by the indorser's wife, was held sufficient.[2]

§ **906. Temporary Abode Not Residence.**— But the fact that a party to a bill or note resides a portion of the year at a particular place will not constitute that his place of residence, so as to render him chargeable with notice of non-acceptance or non-payment, when it is directed to him at the postoffice of such place.[3]

§ **907. Member of Congress.**— And the mere fact that the indorser is known to be a member of congress is not sufficient to warrant sending notice through the mail addressed to him at Washington, D. C.,— especially when he is known to have a residence in the state he represents; though, if he have no fixed place of abode, notice addressed to him at Washington would suffice.[4] It has been held, however, that notice of this kind was not well served upon a member of congress, even during the session of that body, by leaving it inclosed in a letter addressed to him in the postoffice of the house of which he was a member, unless it was actually received.[5]

§ **908. Last Known Residence, When Sufficient.**— When by the exercise of proper diligence the holder is unable to ascertain the present residence of the party to be notified, he may direct the letter containing the notice to him at his last known place of abode. In such case it *may* reach the party for whom it was intended by being forwarded; but whether it does or not, the holder has done all that could reasonably be expected of him.[6]

[1] Exch. & Banking Co. of N. O. *v.* Boyce, 3 Rob. (La.), 307.

[2] Wharton *v.* Wright, 1 Carr. & Kir., 585.

[3] Runyan *v.* Montfort, Busb. (N. C.), 371.

[4] Walker *v.* Tunstall, 3 How. (Miss.), 259; Tunstall *v.* Walker, 2 Sm. & Marsh., 638.

[5] Hill *v.* Norvell, 3 McLean, 583.

[6] Wilson *v.* Senier, 14 Wis., 380.

§ 909. Diligent Inquiry for Unknown Residence.— But when the residence of the party to be notified is unknown to the party whose duty it is to give such notice, the latter will not be excused merely because of such lack of knowledge. He ought to make diligent inquiry — particularly of the other parties to the bill when known to him. And for a failure to make such inquiries in a case where the only party known to the holder lived at a distance of seventy miles, the court held that the indorser was discharged because the holder might have communicated with the known party by letter, and thus have learned the place of residence of the indorser sought to be charged.[1]

§ 910. Inclosing Notices to All, to Last Indorser.— Where there are several indorsers of a note, or indorsers and drawer of a bill, and the last indorser only is known to the holder in whose hands the instrument is dishonored, it is a common practice to inclose the notices to all antecedent parties in a letter notifying the last indorser. This, however, will not suffice to charge them with notice, unless the inclosures are promptly forwarded to the several parties to the instrument.[2] In the case of Shelburne Falls National Bank *v.* Townsley,[3] where the antecedent party resided in the same place as the party to whom the notice was sent inclosed, it was held that a drop-letter containing such notice should have been placed in the office on the same day it was received. And where the antecedent parties reside in another place, the notices intended for them should be promptly forwarded to the proper postoffice of each.[4]

§ 911. Transitory Place of Business.— As notice left at the place of business of resident parties is equally as efficacious as when left at the residence, so is the same option allowed in giving notice by means of the post, where the relative situation of the parties is not such as to require

[1] Hill *v.* Varrell, 3 Me., 233.
[2] Stix *v.* Mathews, 63 Mo., 371.
[3] 102 Mass., 177.
[4] Stix *v.* Mathews, 63 Mo., 371.

personal notice; but the mere presence of the party in any particular place engaged in the transaction of business, when such business is transitory and the party is only temporarily located at the place, for the purpose of disposing of his property there, or the like, will not constitute that his place of business, so that he may be safely notified by a letter addressed to him there.[1]

§ 912. By Mail When Holder and Indorser Are Fellow-Townsmen.— It will often happen that the holder of a bill or note, and his immediate indorser or the drawer, may be residents of the same place, and still the notice of dishonor may be transmitted by mail, and the proof of its having been properly addressed, and posted in due time, will be sufficient to charge the party so notified. As when the holder and indorser of a bill of exchange were residents of Montgomery, and the bill was drawn on Mobile, where it was sent to an agent of the holder for presentment, and on payment being refused, notice thereof was sent by post to the indorser at Montgomery; this was held sufficient, for the reason that the agent sending it stood in the place of the real holder.[2]

§ 913. Agent of Holder, to Indorser in Same Place.— So has it been held, where the agent for collection and the party to be notified reside in the same place, but the actual holder resides elsewhere, that the notice may be sent in this manner by the agent to the indorser, with the same effect as though they lived in separate post towns. The reason for this holding was that as the agent might have given notice by mail to his principal, and he in the same manner to the indorser, it would be requiring an act useless in itself, but one which would involve delay, to compel the agent to adopt this circuitous mode of notification.[3]

[1] Walker *v.* Stetson, 14 Ohio St., 89.

[2] Greene *v.* Farley, 20 Ala., 322.

[3] Gindrat *v.* Mechanics' Bank of Augusta, 7 Ala., 324. See, also, Philipe *v.* Harberlee, 45 Ala., 597.

§ 914. Circuitous Notice by Mail Between Residents of Same Place.—It is competent for successive indorsers to give notice, after receiving it, to their own immediate indorsers, and so on to the last indorser or drawer, and when their immediate indorsers live in another city or village, the notification may be by mail. A modification of the rule similar to that in the case last cited, growing out of a series of indorsements of a bill of exchange, is exemplified in the case of Eagle Bank *v.* Hathaway.[1] The bill was payable in Philadelphia to the order of A., who resided in Providence. A. indorsed it to a bank in Providence, by which bank it was indorsed and transmitted to a bank in New York for collection. The New York bank indorsed and transmitted it for collection to a correspondent in Philadelphia, by whom it was presented, and not being paid, notice was duly forwarded by mail to the New York bank, inclosing notices to prior indorsers. The New York bank forwarded notice in the same manner to the Providence bank, by whom the notice to A. was deposited in the postoffice of that city, addressed to him. It was held that as the notice might have been sent to A. by mail from Philadelphia or New York, the Providence bank being merely a conduit for the transmission of notice, and that if the indorser had been anticipating notice of dishonor he would have looked for it through the postoffice, the notice was sufficient to bind him, though it might have been personally served.

§ 915. Designated Place of Payment — Inquiry.—Merely depositing a letter containing the notice in the office, addressed to the indorser, at the place where the note is made payable, will not suffice, unless the holder has exhausted every means of information as to the residence of the party. Inquiry at the bank and an examination of the city directory would not suffice when inquiry might have been made of other parties to the bill.[2]

[1] 5 Metc., 212.

[2] Gilchrist *v.* Donnell, 53 Mo., 591. See, also, Barret *v.* Evans, 28 Mo. 331; Chapcott *v.* Curlewis, 2 Moody & Rob., 484.

§ 916. Put Upon Inquiry.— As where the holder had been informed that the indorser lived on Long Island, that was sufficient to put him upon inquiry, and, in the absence of countervailing evidence, sufficient to warrant him in believing that such party lived in the city of New York, notice sent him at the latter place would not be sufficient.[1]

§ 917. Insufficient Inquiry.— It has been held that inquiry made by a notary, in a bar-room, and on the street, for the residence of a business man in a neighboring village, when he received no information in answer to his inquiries, would not warrant him in sending the notice to the place where the note was dated, without further inquiry.[2]

§ 918. Sending Notice to Where Instrument Dated, Insufficient.— Nor is the mere sending of the notice by mail, directed to the drawer of a bill at the place where the instrument is dated, sufficient to charge such drawer with notice, in the absence of satisfactory proof that it was received there in due course of mail.[3]

§ 919. Inquiry of Maker, Insufficient.— So, where the holder of a dishonored note made inquiry of the maker, and, on being advised by him to send the notice to the indorser, directed to him at C., and the holder acted upon the advice without further inquiry, though there was a post-office much nearer than C., to the indorser's residence, it was held to be an act of culpable negligence on the part of the holder to rest content with the information obtained upon such inquiry, and the indorser was discharged.[4]

§ 920. Acting on Information from One of the Parties, Sufficient.— But where the note was held by a bank, and one of the parties thereto gave the direction to the cashier, where letters should be sent to reach the indorser, and, acting on such advice, the cashier sent the notice, according to such direction, to a town in which there were four post-

[1] Randall *v.* Smith, 34 Barb., 452. See Granite Bank *v.* Ayers, 16 Pick., 392.

[2] Spencer *v.* Bank of Salina, 3 Hill, 520.

[3] Lowery *v.* Scott, 24 Wend., 358; Sprague *v.* Tyson, 44 Ala., 338.

[4] Davis *v.* Williams, Peck (Tenn.), 191; Woods *v.* Neeld, 44 Pa. St., 86.

offices, without addressing the letter to either in particular, such notice was held sufficient, though the office bearing the name of the town was nine miles from the residence of the indorser.[1]

§ 921. **Inquiry of Drawer.**— So, where the holder applied to the drawer of a bill for information as to the residence of the indorser, it was held that, as the drawer was one in whom the indorser had reposed confidence, the holder had a right to expect a correct answer from him, in relation to the matter which had called forth such expression of confidence, and might safely rely upon it as such.[2] And where the second indorser was applied to under like circumstances, it was held that the notary giving the notice might act upon the information thus obtained without being chargeable with negligence, though such information proved to be erroneous.[3]

§ 922. **Previously Acquired Knowledge.**— So also has it been adjudged sufficient diligence where the holder acted upon his own previously acquired knowledge of the residence of the indorser, and directed the notice accordingly, though by reason of a subsequent change of domicile, of which the holder had no knowledge, the party so notified may have failed to receive the letter in time.[4]

§ 923. **Former Communications.**— Where a letter containing notice of the dishonor of negotiable paper, addressed to the indorser at the town of B. generally, was received and responded to without objection, a subsequent notice, directed to him in the same manner, by the same notary, who was informed that he still lived at B., was held

[1] Catskill Bank *v.* Stall, 15 Wend., 364.

[2] Bank of Utica *v.* Bender, 21 Wend., 643.

[3] Ransom *v.* Mack, 2 Hill, 587; Harris *v.* Robinson, 4 How., 336. See to the same purport, Hargen *v.* Bemis, 1 Thomp. & C. (N. Y.), 460.

[4] Bank of Utica *v.* Phillips, 3 Wend., 408; Bank of Utica *v.* Davidson, 5 Wend., 587; Reid *v.* Payne, 16 Johns., 218; Requa *v.* Collins, 51 N. Y., 144 [unless he ought to have known of such change]; Harris *v.* Memphis Bank, 4 Humph., 519.

sufficient, though there were several postoffices in B., none of which were of the same name as the town, and notwithstanding, also, that the indorser had removed from the town since the receipt of the former notice.

§ 924. **Surname Alone Insufficient.**—The notice may be directed to the proper place, and still, from the manner in which it is addressed, cast the burden of proving its due receipt by the party to be charged, upon the party giving the notice. As where the letter is addressed to the party merely by his surname and is not directed to his residence or place of business by number, but to the general delivery of a large city.[2] So, where the notice was addressed to the "estate" of a deceased indorser, in the absence of proof of diligent inquiry for the name of the executor, this was held insufficient.[3]

§ 925. **Delay Chargeable to Indorser.**—But where the negligence which occasions the delay is properly chargeable to the indorser himself, he must bear the consequences. As where he writes his name upon the instrument so illegibly as to mislead one not perfectly acquainted with his writing, or to leave room for a doubt as to the proper rendering of his signature, the party giving the notice will be justified in relying upon its appearance and addressing the notification accordingly.[4]

§ 926. **Holder Misled by Place of Date.**—So where a bill was drawn, dated "London," but not otherwise giving the address of the drawer, and notice of its dishonor was addressed to the drawer in the same general way, it was held, notwithstanding the drawer's denial of receipt of notice, and the further fact that inquiry of the acceptor would have disclosed that he lived at Chelsea, there was sufficient evidence of diligence to go the jury, and the court was of

[1] Saco National Bank *v.* Sanborn, 63 Me., 340.
[2] Walter *v.* Haynes, Ry. & Moody, 149; True *v.* Collins, 3 Allen, 438.
[3] Manchester Bank *v.* Oliver, 10 Cushing, 557.
[4] Manufacturers' Bank *v.* Hazard, 30 N. Y., 226.

the opinion that the notice was sufficient.[1] So, also, has a notice addressed to the "legal representatives" of a deceased party to a negotiable instrument been held sufficient.[2]

§ 927. **Address Should Include Name of State.**— But in addressing a letter containing a notice of this sort to a party in any one of the states of the Union, the name of the state should always form a part of the direction, as there are frequently places in different states of precisely the same name.[3]

§ 928. **When Address Designated by Indorser.**— The indorser has a right to designate with particularity the address to which the notice shall be sent, and make it known to all subsequent holders by writing the same on the back of the instrument, in conjunction with his indorsement. And when a place is so designated, the notice should be directed there, unless the party giving notice is aware of the indorser's removal subsequent to his indorsement.[4] In fact, should the indorser fail to receive the notice in time, by reason of its being sent elsewhere than to such designated address, he will be discharged.[5]

§ 929. **Delay from Sending by Unusual Route.**— From the language of the authorities already cited, as well as upon principle, it would seem that in giving the notice through the postoffice, it was not incumbent upon the person giving it to select any particular route, it being sufficient to post the letter in time to go by the outgoing mail. It would also seem that where the giver of the notice undertakes to send it by an unusual route, or in an unusual manner, and its receipt is thereby delayed, the indorser will be discharged from liability; but it has been held, when a notice

[1] Burmester *v.* Barron, 17 Ad. & Ell. (Q. B.), 828; Mann *v.* Moors, Ry. & Mood., 249; Clarke *v.* Sharpe, 3 Mees. & Wels., 166.

[2] Pillow *v.* Hardeman, 3 Humph. (Tenn.), 538; Boyd *v.* Savings Bank, 15 Gratt., 501.

[3] Beckwith *v.* Smith, 22 Me., 125.

[4] Peters *v.* Hobbs, 25 Ark., 67.

[5] Bartlett *v.* Robinson, 39 N. Y., 187.

was sent by a designated route and under cover to another, whereby its arrival was delayed several days beyond the time it would have come to hand under a general direction, addressed to the indorser at his place of residence, that the notice was sufficient, as the notary sending it might choose the route, and was not bound to choose the shortest.[1] This case was decided, however, by a divided court, the better reason being with the dissenting opinion. The case is scarcely entitled to be followed generally as an authority.

[1] Bank of Utica *v.* Smith, 18 Johns., 230.

V. Waiver and Excuse.

§ 930. General Character of Waiver.
931. Division of Subject.
932. Waiver May be Antecedent or Subsequent.
933. Antecedent Waiver in Writing.
934. Effect of "Protest Waived."
935. "I Waive Demand of Protest."
936. Waiver of Notice Does Not Include Presentment.
937. No Special Form Required.
938. Waiver by Letter.
939. May be Verbal.
940. May be Established by Circumstances.
941. Promise to Maker.
942. When Promise Supported by Consideration.
943. Indemnity Does Not Always Waive.
944. Note for Real Estate, Legal Title Still in Grantor.
945. Where Waiver Depends on Sufficiency of Indemnity.
946. Indemnity Taken for His Own Security.
947. Illustration of Foregoing Doctrine.
948. Indorser with Funds of Maker Does Not Become Principal.
949. Assignment to Trustees Will Not Excuse.
950. Taking Mortgage of All Maker's Property Held No Waiver.
951. Indemnity Stronger Reason for Notice.
952. Illustration.
953. Indorsement of Renewal Note.
954. Request No Waiver When Not Acceded to.
955. Waiver by Indorser.
956. Conflicting Views.
957. Conditions of Waiver by Subsequent Promise.
958. Subsequent Promise Without Knowledge.
959. Promise, Express and Implied.
960. Implied Promise.
961. Promise to "See it Paid."
962. Recitals in Contract Acknowledging Bill.
963. Subsequent Waiver Must be Unequivocal.
964. Admissions to Strangers Do Not Amount to Waiver.
965. Anxiety to Have the Bill Paid, Not Waiver.
966. Where Subsequent Promise Evidence of Notice.
967. Subsequent Promise a Waiver.
968. Even Written Admission Not Conclusive.
969. Subsequent Promise Either Waiver or Admission.
970. *Onus Probandi.*
971. Subsequent Promise *Prima Facie* Evidence of Diligence.

§ 972. Evidence of Knowledge of Laches.
973. *Onus* Cast Upon the Holder.
974. Principles Governing the Question.
975. Knowledge of Facts and Not Their Legal Effect.
976. Excuses of a General Nature Enumerated.
977. Excuses of a Special Character.
978. Inevitable Accident.
979. Prevalence of Malignant Fever.
980. Existence of War.
981. Interdiction of Commerce.
982. Actual Hostilities.
983. Late War.
984. Interruption of Postal Communication.
985. War Where Note Payable.
986. Not Excused if Intercourse Legal.
987. Loss of Note by War No Excuse.
988. Entitled to Notice When Obstruction Removed.
989. Party Not Required to Violate Law of His Domicile.
990. Due Diligence.
991. Notice of Facts Excusing Demand.
992. Obstructions Removed — Demand and Notice.
993. Death of Holder.
994. Sudden Sickness and Death of Agent.
995. Sickness Must be Sudden and Severe.
996. Special Excuses Treated as Waiver.
997. Bill Drawn for Benefit of Drawer.
998. Note for Accommodation of Payee.
999. For Accommodation of Drawee or Acceptor.
1000. Not Excused by Promise of Drawer to Provide for Bill.
1001. No Funds in Hands of Drawer.
1002. Application of the Rule Confined.
1003. American Cases Decided on Insufficient Reason.
1004. No Right to Expect Payment.
1005. Drawer Against Goods *in Transitu*.
1006. Opinion of Marshall.
1007. Illustration.
1008. Mere Existence of Credit.
1009. Expectation of Payment Must Continue to Maturity.
1010. Need Not be Anticipated from Drawee.
1011. Promise from Drawee.
1012. Where Drawee Has Already Honored Drafts.
1013. Running Account Between Parties.
1014. Suspecting Absence of Funds, No Excuse.
1015. Drawer Being in Debt to Drawee, No Excuse.
1016. No Expectation of Funds at Place, No Excuse.

§ 1017. No Excuse for Failing to Notify Indorser.
1018. Accommodation Indorser.
1019. Indorser, with Notice of Facts Excusing Notice.
1020. Former Partnership Between Drawer and Drawee, No Excuse.
1021. Partner Drawing Upon His Firm, Not Entitled to Notice
1022. Goods Purchased for Use of Firm, Will Not Excuse.
1023. Fraud by Indorser Excuses Notice.
1024. Motives for Indorsement Immaterial.
1025. Adding the Word "Surety," No Excuse.
1026. Presence of Indorser When Payment Refused, No Excuse.
1027. Attachment of Funds, No Excuse.
1028. Note Void at Inception, Notice Unnecessary.

§ **930. General Character of Waiver.**— The consequences of a waiver of notice by an indorser or drawer, or of anything by which notice will be excused, are substantially the same. The party who otherwise would be entitled to notice of the dishonor of the bill or note, as a condition precedent to the fixing of his liability, by such waiver, or facts excusing notice, becomes unconditionally liable. But notwithstanding the identity of results, there is an essential difference between what is described in the books as a waiver, and what is held to excuse the notice by which the obligation, implied by the act of drawing a bill or indorsing a note, loses its conditional character and becomes a fixed liability. The waiving of this right is either expressly or by implication the voluntary act of the party for whose benefit the law requires the notice to be given. While matters in justification or excuse of the omission of duty on the part of the holder may arise without any act of volition on the part of the antecedent party whose liability depends upon notice.[1]

§ **931. Division of Subject.**— In treating this branch of our subject the voluntary act of the party, by which the necessity for notice is dispensed with, will be considered first in order; and secondly, such matters as are held to excuse the giving of due notice, without regard to the intentions of the party to be notified.

[1] Story on Prom. Notes, § 358.

§ 932. Waiver May be Antecedent or Subsequent.— Judge Story lays down the doctrine that in cases of waiver, strictly so called, the indorser is discharged from all liability by the antecedent laches of the holder or other party; and he incurs a new liability by his subsequent assent and waiver of his rights, after the laches is incurred, and has been fully made known to him.[1] But if we are to follow this learned author in what he says in the same connection respecting an excuse for the omission or neglect of due notice, and hold with him that it is "in its nature a justification for such omission or neglect, without any consent, express or implied, on the part of the indorser, to be bound by it," we shall find many instances where notice is voluntarily dispensed with by the indorser or drawer, long prior to the maturity of the instrument, and consequently before the holder could have been guilty of laches, and will feel justified in classing these as instances of *waiver*. This classification not only seems logical and consistent, as there can be no good reason why a right may not be waived in advance, but it has the additional advantage of meeting the general understanding of a proper application of the term.

§ 933. Antecedent Waiver in Writing.— A common example of express waiver before maturity is when by apt words the intention to dispense with this formality is expressed upon some portion of the instrument, or there is an express waiver of demand, as "I hereby waive protest on the within note, and hold myself bound for the payment of the same, as if legally protested;"[2] or "I hereby waive notice, demand, protest and due diligence;"[3] and even where it was written in the note, "Protest and notice of protest waived," this was held sufficient to waive not only notice, but demand.[4]

[1] Story on Prom. Notes, § 358.
[2] Ball *v.* Greaud, 14 La. An., 305.
[3] Neal *v.* Wood, 23 Ind., 523.
[4] Gordon *v.* Montgomery, 19 Ind., 110.

§ 934. Effect of "Protest Waived."— So, where the words "protest waived" were used with reference to a promissory note, it was held to amount to a waiver of both demand and notice, notwithstanding the fact that the meaning which attaches to the word "protest" is entirely different from that of the word "notice." The former is only applicable in strictness to foreign bills of exchange, while the latter applies to bills both foreign and inland, and negotiable promissory notes, indiscriminately. But when applied to promissory notes, the word "protest," by general usage and understanding, means the taking of such steps as are necessary to charge an indorser, which include both demand and notice.[1]

§ 935. "I Waive Demand of Protest."— So, also, where the indorsers, on the transfer of a note to plaintiff, agreed to indorse it and waive demand and notice, and accordingly made the following indorsement thereon, signed by them in their firm name: "I waive demand of protest," it was held that the language of the indorsement, although clumsily worded, might be construed as implying an intention to waive both demand and notice, and that, if the language were too indefinite or ambiguous, the meaning might be made out by parol.[2]

§ 936. Waiver of Notice Does Not Include Presentment.— The waiver may be embodied in the instrument over the signature of the drawer or maker, and thereby become binding upon all those who subsequently become parties thereto,[3] or it may be incorporated with the contract of indorsement of one of the parties, so as to be binding upon himself, without affecting subsequent or prior parties to the bill or note. In general, a waiver of notice does not

[1] Carpenter *v.* Reynolds, 42 Miss., 807; Jaccard *v.* Anderson, 37 Mo., 91.

[2] Porter *v.* Kemball, 53 Barb., 467; Union Bank *v.* Hyde, 6 Wheat., 572. *Contra*, Bird *v.* Le Blanc, 6 La. An., 470; Wall *v.* Bry, 1 id., 312.

[3] Bryant *v.* Merchants' Bank of Ky., 8 Bush, 43; Smith *v.* Lockridge, id., 423; Lowry *v.* Steele, 27 Ind., 168; Woodman *v.* Thurston, 8 Cush., 157.

include presentment or demand, nor does it, by implication, excuse a failure in either of these respects;[1] but this rule is modified somewhat to meet the peculiar circumstances of particular cases. It depends, to some extent, upon the time when the waiver is made. Accordingly, where such waiver was indorsed on the note on the day of maturity — after the holder had informed the prior party that he had been to the place of payment, and there were no funds there, the written waiver of notice of protest was held to waive any irregularity of demand as well as notice.[2]

§ 937. **No Special Form Required.**— No particular form of words is necessary to waive notice. Whatever language is employed, it will be sufficient if it conveys the information that the indorser or drawer intends to absolve the holder from the exercise of that diligence in making demand and giving notice of dishonor which the law imposes. So where there was added to the blank indorsement the word "accountable," this was held to be a waiver of demand and notice;[3] and the same construction was, in another case, given to the words "eventually accountable," when added to his indorsement by the party transferring the note.[4] The following waiver, indorsed upon a note, was held sufficient to dispense with demand and notice: "I assign the within note to J. T., and hold myself responsible for the payment of the same; the said P. [the maker] to have two years to pay the same, unless he prefer to pay sooner, interest on the same to be paid annually."[5]

§ 938. **Waiver by Letter.**— But instances of waiver prior to maturity are by no means confined to cases where the written waiver is made part of the instrument, or indorsed

[1] Voorhies *v.* Atlee, 29 Ia., 49; Buchanan *v.* Marshall, 22 Vt., 561; Drinkwater *v.* Tebbetts, 17 Me., 16; Berkshire Bank *v.* Jones, 6 Mass., 524; Backus *v.* Shipherd, 11 Wend., 629; Burnham *v.* Webster, 17 Me., 50.

[2] Scull *v.* Mason, 43 Pa. St., 99; Mills *v.* Beard, 19 Cal., 158; Fisher *v.* Price, 37 Ala., 407.

[3] Furber *v.* Caverly, 42 N. H., 74.

[4] McDonald *v.* Bailey, 14 Me., 101.

[5] Airey *v.* Pearson, 37 Mo., 424.

thereon when the note is transferred. Where the indorser, a few days previous to the maturity of the note upon which he was liable, wrote to the holder, informing him that the maker had failed, acknowledged his own liability, and asked indulgence until funds could be realized from securities held by him from the maker, this acknowledgment was held sufficient to dispense with both demand and notice.[1]

§ **939. May be Verbal.**—Nor is it even necessary, to render the waiver of notice effectual to bind the drawer or indorser, that it should be reduced to writing. It has been held, in a few isolated cases, that as the written indorsement is the highest and best evidence of the indorser's contract, it could not be varied or modified by a parol promise, and consequently, a contemporaneous verbal promise by the indorser, to pay the note in the event the maker did not, would not dispense with notice of dishonor.[2] But this view of the question is ably controverted by Judge LOWRIE, in Barclay *v.* Weaver.[3] The learned judge frankly says: "I decided this cause while I was judge of the court below. * * * But on the first point, I am convicted and convinced of error. That point presents the question, may a party prove by parol testimony, that, at the time of the indorsement of a promissory note, it was agreed that the indorser should be absolutely bound for the payment of it, without the usual demand and notice? This was answered in the negative in the court below, on the principle that oral testimony cannot be heard to vary the terms of a written contract. It is not so. * * * The most, therefore, that can be said of an indorsement of negotiable paper is, that from it there is *implied* a contract to pay on condition of the usual demand and notice; and that this implication is liable to be changed on the appearance of circumstances inconsistent with it, whether those circumstances be shown orally

[1] Leffingwell *v.* White, 1 Johns. Cas., 99; Minturn *v.* Fisher, 7 Cal., 573; Yeager *v.* Farwell, 13 Wall., 6.

[2] Hightower *v.* Ivey, 2 Port. (Ala.), 308; Barry *v.* Morse, 3 N. H., 132.

[3] 19 Pa. St., 396.

or in writing." And in the same connection — "But it may well be questioned whether the condition of demand and notice is truly part of the contract, or only a step in the legal remedy upon it." Although the reasoning of this opinion has not been fully adopted in cases where the same result is reached, the decided weight of authority is in favor of the doctrine that the conditions of the indorser's or drawer's contract may be waived by a parol contract, and that parol testimony of circumstances tending to show a waiver of such conditions will be competent to establish the fact.[1]

§ **940. May be Established by Circumstances.**— As already intimated, the fact of waiver of notice may be established by the proof of circumstances, inconsistent with the right of the antecedent party to insist upon the observance of the conditions of his contract, as well as by the express promise of such party. Not the least common of these circumstances is the verbal declaration of the indorser or drawer, which implies a waiver of the conditions upon which his contract depends. As where the maker and indorser of a note resided in the same house, and the holder sending a written notice to the maker on the day of its nominal maturity — before the expiration of the three days of grace — the maker was absent from home, and the holder's messenger exhibited the note to the indorser, who read it and informed the messenger that the maker would see the holder in a short time, and wished him not to sue the note until the maker could see him, it was held that this was a request for further forbearance, and was calculated to induce the holder to believe that measures were being taken to meet the note. It was held to amount to an implied waiver of demand and notice.[2] So where the drawer requested the holder not to present the draft

[1] Fuller *v.* M'Donald, 8 Me., 213; Lane *v.* Steward, 20 Me., 98; Farmers' Bank *v.* Waples, 4 Harr. (Del.), 429; Phipson *v.* Kneller, 1 Stark., 116; Barker *v.* Parker, 6 Pick., 80.

[2] Gove *v.* Vining, 7 Metc., 212.

once, but to hold on to it for a time, he was held thereby to have waived demand and notice.[1]

§ 941. **Promise to Maker.**— So, also, in Marshall *v.* Mitchell,[2] the language of Judge Wells, in rendering the opinion, is, "that the promise of defendant (the indorser), several months before the note is due, made to the maker, that he would take it up, was a fact of which the plaintiff (the holder) had a right to avail himself. * * * When the indorser says to the maker, he will pay the note, it is a declaration that the other parties need not give themselves any trouble in relation to it." It is probable, however, that whether a merely gratuitous promise of this kind, made by the indorser to the maker, would operate to absolve the holder from the duty of giving the promisor due notice of dishonor, would depend somewhat upon the holder's having notice of such promise. But where the indorser informed the holder of the failure of the maker, before the note became due, and said further that he should have no trouble about it, as the note should be paid, this was properly held a waiver of demand and notice, though neither of these conditions were expressly mentioned.[3] And upon the same principle, where the indorser, at the time of the transfer of the note, informed the indorsee that he would be at the place of payment when the note fell due, and would then take it up if it were not paid by any other party to it, this was held to be an agreement to pay on but one condition, and that all others implied in the contract of indorsement, including that of notice, were waived.[4]

§ 942. **When Promise Supported by Consideration.**— It is equally certain that where the promise to the maker is not a mere gratuity on the part of the indorser, but is supported by a valid consideration, as the return of the original consideration of the note, or where other property

[1] Sheldon *v.* Chapman, 31 N. Y., 644.
[2] 35 Me., 221.
[3] Whitney *v.* Abbot, 5 N. H., 378.
[4] Boyd *v.* Cleveland, 4 Pick., 524; Lane *v.* Steward, 20 Me., 98.

of the maker is taken absolutely by the indorser, with the agreement to take up the note, whether this be before or after dishonor, it will amount to a waiver of all the conditions of the contract of indorsement.[1]

§ 943. Indemnity Does Not Always Waive.— But the principle upon which notice is waived, or excused, by the acceptance of indemnity, on the part of an indorser, and his undertaking to become the principal debtor, has been carefully restricted in its application, so as not to include all cases where the party conditionally liable is indemnified against loss. Some of the cases holding that notice is waived or excused by indemnity taken are decided upon the ground that the want of notice can work no injury to the indorser, provided he holds sufficient security to save him harmless;[2] and others, where the indorser has taken a general assignment of all the maker's property before maturity of the note, upon the ground that the indorser, having already acquired all that he could obtain by pursuing his remedy against the maker, will not desire to avail himself of such remedy, and consequently notice would be fruitless.[3] Most of the cases cited, where these doctrines are broadly announced, seem to be decided in accordance with sounder principles than those loosely stated as the ground of the decisions.

§ 944. Note for Real Estate, Legal Title Still in Grantor.— For example, in Develing *v.* Ferris,[4] the note was given for real estate sold by the indorser to the maker,

[1] Andrews *v.* Boyd, 3 Metc., 434; Taunton Bank *v.* Richardson, 5 Pick., 436; Scott *v.* Greer, 10 Pa. St., 103.

[2] Holman *v.* Whitney, 19 Ala., 703; Barrett *v.* Charleston Bank, 2 McMullen, 191; Stephenson *v.* Primrose, 8 Port. (Ala.), 155.

[3] Mechanics' Bank *v.* Griswold, 7 Wend., 165; Bond *v.* Farnham, 5 Mass., 170; Commercial Bank *v.* Hughes, 17 Wend., 94; Perry *v.* Green, 19 N. J. Law, 61; Barton *v.* Baker, 1 Serg. & R., 334; Develing *v.* Ferris, 18 Ohio, 170; Stephenson *v.* Primrose, *supra;* Bank of South Carolina *v.* Meyers, 1 Bailey, 412; Kyle *v.* Greene, 14 Ohio, 495; Kramer *v.* Sanford, 4 Watts & S.. 328; Walters *v.* Munroe, 17 Md., 154; Prentiss *v.* Danielson, 5 Conn., 175.

[4] 18 Ohio, 170.

and the legal title was expressly reserved by the grantor, until the payment of the purchase money. This amounted to more than the taking of indemnity, the sufficiency of which could only be approximately determined, and more than the acceptance of an assignment of the maker's entire estate, regardless of its sufficiency. Kyle *v.* Greene[1] presents substantially the same state of facts, and the conclusion reached is the same.

§ 945. Where Waiver Depends on Sufficiency of Indemnity.—The reasoning upon which those cases depend, where the question of waiver is made to turn upon the sufficiency of the indemnity, and that to the extent of the value of the indemnity the indorser may be held liable without notice, because he suffers no injury on account of its omission, is calculated to open a question of fact, subversive of the doctrine of notice of dishonor of negotiable securities, in its application to all cases. If, where the indorser has received collateral security, we are to inquire into its sufficiency to determine whether he will be required by a failure to give him notice of the dishonor of the instrument upon which he has become conditionally liable, there seems no reason why, in every case that may arise, the conditional nature of his contract may not be made to depend upon the question whether he is really prejudiced by a failure to give the notice within the time and in the manner and mode which the courts have almost universally agreed upon as reasonable and just. It is well known that in reply to the defense of insufficient notice, the courts will not entertain the excuse that the indorser suffered no injury by the omission or neglect. They will not go into detailed examination of the condition of the parties and the circumstances of the transaction in order to determine whether the general rule will apply.[2]

§ 946. Indemnity Taken for His Own Security.—Where, however, the indorser has, by his own voluntary act,

[1] 14 Ohio, 495.

[2] Hill *v.* Martin, 12 Mart., 177; Dennis *v.* Morrice, 3 Esp., 158.

rendered it impossible for the maker to pay a note, or has received into his own hands a fund sufficient to satisfy the same, under a contract, express or implied, to become the principal debtor, there is abundant reason for holding that he thereby waives demand and notice, and consents that the obligation he has assumed shall become fixed and unconditional.[1] But the mere taking of security to indemnify him against possible loss does not alter the character of his original undertaking. The promise which the law implies from his indorsement is that *if* payment of the note or bill is demanded at maturity, *if* payment is refused, and *if* he is duly notified of the non-payment, then he will be bound to pay the same, and is entitled to look to the party ultimately liable for reimbursement. This is the nature of the liability against which he seeks to be indemnified, and until all the contingencies upon which that liability depends have happened, and all the conditions duly performed by the obligee, his obligation to subsequent parties retains its conditional character. When the time within which he should be notified has expired, he may safely return his security to the hands from which it was received. The indemnity was taken for his own security, and he is under no obligation to retain it for the benefit of other parties on the same paper.[2]

§ 947. Illustration of Foregoing Doctrine.— In Clegg *v.* Cotton,[3] the drawer of a bill of exchange, being the agent of the drawee, had placed funds in the hands of the indorser by way of indemnity, which were to be returned on

[1] Seacord *v.* Miller, 13 N. Y., 55; Denny *v.* Palmer, 5 Ired., 610; Cornoy *v.* Da Costa, 1 Esp., 303.

[2] Denny *v.* Palmer, 5 Ired., 610; Seacord *v.* Miller, 13 N. Y., 55; Taylor *v.* French, 4 E. D. Smith, 458; Spencer *v.* Harvey, 17 Wend., 459; Clegg *v.* Cotton, 3 Bos. & Pul., 239; Oswego Bank *v.* Knower, Hill & Den., 122; Ray *v.* Smith, 17 Wall., 411; Watkins *v.* Crouch, 5 Leigh, 522; Marshall *v.* Mitchell, 34 Me., 227; Haskell *v.* Boardman, 8 Allen, 38; Wilson *v.* Senier, 14 Wis., 380; Moses *v.* Ela, 43 N. H., 557; Holland *v.* Turner, 10 Conn., 308.

[3] 3 Bos. & Pul., 239.

his release from liability. The court held that he was released by a failure of the holder to notify him of the dishonor of the bill, and could consequently return the funds held as security.

§ 948. Indorser with Funds of Maker Does Not Become Principal.— In Ray *v.* Smith,[1] the funds in the hands of the indorser were derived from the profits of business carried on by the indorser and maker as partners, and the latter had merely authorized the former to apply them to the payment of the notes at their maturity, but the court refused to decide, as a conclusion of law, that the indorser, as between himself and the maker, had assumed the obligation of a principal debtor.

§ 949. Assignment to Trustees Will Not Excuse.— The prominent circumstances of the case of Watkins *v.* Crouch [2] were, that there was an assignment to a trustee of all the maker's property, in trust to pay off several debts, and among them one-fourth the principal and interest of the note upon which the defendant was an indorser. This was held insufficient to dispense with notice of the dishonor.

§ 950. Taking Mortgage of All Maker's Property, Held No Waiver.— In Haskell *v.* Boardman,[3] the point decided was that a mortgage of all the maker's property, accepted by the indorsers, conditioned that the grantor should perform all contracts which the grantees had theretofore or should thereafter sign, indorse, etc., and save the said grantees harmless from all costs and expense in consequence thereof, would not amount to a waiver of notice of dishonor of the instrument indorsed.

§ 951. Indemnity Stronger Reason for Notice.— In rendering the opinion in Taylor *v.* French,[4] the learned judge declares that instead of the security for the indorsement affording a reason for dispensing with notice to the indorser

[1] 17 Wall., 411.
[2] 5 Leigh, 522.
[3] 8 Allen, 38.
[4] 4 E. D. Smith, 458.

thus secured, it furnishes a stronger reason why he should be informed of the non-payment. Without notice thereof he might suppose it to have been paid, and, in consequence of such neglect, have parted with his security. Substantially the same reasoning is employed by Judge Bissell in rendering the opinion in the case of Holland *v.* Turner.[1]

§ 952. **Illustration.**— The possibilities hinted at above are practically illustrated by an early English case.[2] There, certain notes were indorsed by G. for D., who was insolvent. A few days before maturity the indorser informed the holder that if the note was sent him he would pay it. This was construed to mean that he would pay it if it came to him in the regular way after being duly presented. At the time of making the offer, the indorser had in his possession a fund belonging to D. from which to pay the note. Demand not being made until three days after maturity, the indorser gave up the funds and was held discharged for want of due notice.

§ 953. **Indorsement of Renewal Note.**— It has been held that the mere indorsement of a renewal note, in anticipation of the non-payment of the original obligation at maturity, where the bank holding the original refused to discount the renewal, will not amount to waiver of notice; for notwithstanding the fact that the maker may fail to renew, this would not be conclusive evidence that payment was impossible.[3]

§ 954. **Request No Waiver When Not Acceded to.**— The very limit of strictness in favor of the indorser's right to notice seems to have been reached, if not overstepped, in the case of Cayuga Bank *v.* Dill.[4] There the indorser called upon the holder on the day of the maturity of the instrument, and told him that the maker would not pay, as he was absent from the country, and to let it lie over

[1] 10 Conn., 308.
[2] Nicholson *v.* Gouthit, 2 H. Bl., 609.
[3] May *v.* Boisseau, 8 Leigh, 164.
[4] 5 Hill, 403.

until his return, when $100 would be paid, and the note renewed for the balance. The holder failed to protest the note, through a mistake of the clerk of the bank, as to the day of its maturity, and not on account of this conversation; and for this reason alone it was held that the express request of the indorser, to let the note lie over, did not amount to a waiver, and he was consequently discharged by the laches.

§ **955. Waiver by Indorser.**— Although a waiver of notice in the body of the instrument will be binding upon all those who become parties thereto, the same result does not follow a waiver by the first indorser. Each indorsement is the personal obligation of the party who makes it, and the subsequent indorser will be entitled to notice notwithstanding a waiver thereof by a prior party.[1]

§ **956. Conflicting Views.**— There is a lack of harmony between the authorities, respecting the consequences of a promise by the indorser or drawer to pay the dishonored instrument. This difference, however, is in regard to the technical operation of such subsequent promise, as well as the extent to which it affects the liability of the promisor. The cases of one class are decided upon the hypothesis that there has been a failure of notice; but by the subsequent promise they hold the neglect or omission is waived.[2] Those of another class are decided upon the theory that although there is no direct proof of notice, the subsequent promise raises a presumption that such notice was given, which can only be overcome by proof of the negative of that proposi-

[1] Central Bank *v.* Davis, 19 Pick., 373.

[2] Hopkins *v.* Liswell, 12 Mass., 52; Donaldson *v.* Means, 4 Dall., 109; Oglesby *v.* Steamboat, 10 La. An., 117; Salisbury *v.* Renick, 44 Mo., 554; Cheshire *v.* Taylor, 29 Ia., 492; Viele *v.* Germania Ins. Co., 26 id., 9; Hughes *v.* Bowen, 15 id., 446; Mathews *v.* Allen, 16 Gray, 594; Smith *v.* Curlee, 59 Ill., 221; Pate *v.* McClure, 4 Rand., 164; Debuys *v.* Mollere, 3 Mart. (N. S.), 318; Woodson *v.* Eastman, 10 N. H., 359; Cram *v.* Sherburne, 14 Me., 48; Leonard *v.* Gary, 10 Wend., 504; Hazard *v.* White, 26 Ark., 155; Thornton *v.* Wynn, 12 Wheat., 183; Stix *v.* Mathews, 63 Mo., 371; Chaffee *v.* M. C. & N. W. R. R. Co., 64 Mo., 193.

tion.[1] There is still a third class where there seems to be an attempt to hold the promisor upon both grounds, or upon either in the alternative.[2]

§ 957. **Condition of Waiver by Subsequent Promise.**— Where the effect given to the subsequent promise is that it shall be regarded as a waiver of the omission, or neglect to give notice of dishonor, it is subject to certain conditions which cannot be dispensed with in any instance. The promise must be absolute, unconditional, and made with a full knowledge of the laches of the holder or other subsequent party in neglecting to make demand or give due notice of non-payment, as well as a knowledge of any other circumstances by which the indorser's rights may be affected.[3]

§ 958. **Subsequent Promise Without Knowledge.**— Where the indorser was in possession of full knowledge of the dishonor, and also was aware that the time within which notice should have been given had expired, but was ignorant, at the time of the subsequent promise, that a prior party had been permitted to erase his indorsement, the subsequent promise was held not binding upon him.[4]

§ 959. **Promise, Express and Implied.**— The doctrine as laid down by Lord Mansfield in Barradaile *v.* Lowe [5] is that an indorser, after having been discharged, cannot be rendered liable on the bill except by an *express* promise with knowledge of the fact. This interpretation of the rule

[1] Lawrence *v.* Ralston, 3 Bibb, 102; Donelly *v.* Howie, Hayes & J., 436; Huntington *v.* Harvey, 4 Conn., 124; Gibbon *v.* Coggon, 2 Camp., 188.

[2] Union Bank *v.* Grimshaw, 15 La., 321; Tebbetts *v.* Dowd, 23 Wend., 379; Breed *v.* Hillhouse, 7 Conn., 523.

[3] Ford *v.* Dallom, 3 Cold., 67; Blum *v.* Bidwell, 20 La. An., 43; Van Wickle *v.* Downing, 19 id., 83; Baskeville *v.* Harris, 41 Miss., 535; Bank of U. S. *v.* Leathers, 10 B. Mon., 64; Kelley *v.* Brown, 5 Gray, 108; Gawtry *v.* Doane, 48 Barb., 148; Arnold *v.* Dresser, 8 Allen, 435; Walker *v.* Rogers, 40 Ill., 278; U. S. Bank *v.* Southard, 17 N. J. Law, 473; Hunter *v.* Hook, 64 Barb., 468; Martin *v.* Winslow, 2 Mason, 241; Spurlock *v.* Union Bank, 4 Humph., 336.

[4] Low *v.* Howard, 10 Cush., 159.

[5] 4 Taunt., 93.

was applied to the case decided where it was sought to bind the indorser, who was incontestably discharged by the neglect of the holder to give notice of dishonor, but who had, after such neglect came to his knowledge, written to the holder to send the bill to a prior indorser. There is perhaps no case where the giving of such gratuitous advice has been construed into a promise to pay; but there seems to be no solid reason why contracts of this kind should be restricted to such as are express in their terms. Later authorities have, without abandoning in any degree the doctrine that the promise should be unconditional, decided that the indorser could be held by an *implied* as well as an *express* promise.

§ **960. Implied Promise.**—For example, where, subsequent to the dishonor, and in the absence of notice, the indorser, with knowledge of the laches, makes a payment on the bill or note, this has been construed as an implied promise to pay the balance.[1]

§ **961. Promise to "See it Paid."**—So where the indorser, on being informed, more than four weeks after the note became due, that it had not been paid, made no objection that he had not been seasonably notified of the dishonor, but said that he would see it paid; although this could hardly, in strictness, be called an express promise to pay, it was regarded as sufficient to bind the indorser to the fulfillment of the terms of his indorsement, as though he had received due notice.[2]

§ **962. Recitals in Contract Acknowledging Bill.**—So, also, the recitals in a contract between the drawer and prior indorser of a bill, to the effect that the bill was overdue, and ought to be in the hands of the prior indorser, and that the latter should take the money due him on the bill by instalments, was admitted in evidence, in an action by

[1] Knapp *v.* Runals, 37 Wis., 135; Swan *v.* Hodges, 3 Head, 251; Tebbetts *v.* Dowd, 23 Wend., 379.

[2] Ladd *v.* Kenney, 2 N. H., 340.

a subsequent indorser against the drawer, to prove a waiver of notice.[1]

§ 963. **Subsequent Waiver Must be Unequivocal.**— Nevertheless, it is generally held that to constitute an undertaking to pay the bill, which is implied from the conduct of the indorser or drawer after dishonor, there must be a more unequivocal recognition of liability than would amount to a waiver if made prior to maturity. As, in cases where the doctrine is fully recognized that the acceptance of an assignment of the maker's entire estate would amount to a waiver if made prior to the maturity of the note, it is held that such an assignment would not have the same effect when made subsequent to dishonor, although aided by the admission of the indorser that he was "fully indemnified for all his liabilities" for the maker. The admission was held to refer to his *legal* liabilities.[2]

§ 964. **Admissions to Strangers Do Not Amount to Waiver.**— The language used by the party, or his conduct with respect to the dishonored bill, does not always operate as an admission of continued liability. Should there be an express admission with knowledge of the failure to give due notice, it would only be held binding by giving it the construction of an implied promise to pay. If it were allowed to take effect as a mere admission of liability, it would be immaterial to whom the admission was made; while it is held that a subsequent statement by the indorser, to a stranger to the bill, that the fact of notice not having been given at a proper time would make no difference with him, did not amount to a waiver of notice.[3] But where the acknowledgment comes in the form of a promise, it will be as effective when made to the agent of the holder as though it were to the holder himself.[4]

[1] Gunson *v.* Metz, 1 Barn. & Cres., 193.

[2] Walters *v.* Munroe, 17 Md., 154; Prentiss *v.* Danielson, 5 Conn., 175.

[3] Olendorf *v.* Swartz, 5 Cal., 480.

[4] Sigerson *v.* Mathews, 20 How., 496.

§ 965. **Anxiety to Have the Bill Paid, Not Waiver.**— The mere manifestation of anxiety, by the party discharged for want of notice, to have the note or bill paid by the party ultimately liable, howsoever such anxiety may be manifested, provided it stops short of an unconditional promise, express or implied, to pay and discharge the indebtedness himself, will not amount to a waiver of notice.[1]

§ 966. **Where Subsequent Promise Evidence of Notice.**— Those cases holding strictly to the doctrine that the subsequent promise is to be taken as presumptive evidence of due demand and notice are forced to abandon entirely the hypothesis that there has been a failure of either of these requisite formalities. It would be extremely illogical to admit an element to a proposition which was in direct contradiction of the hypothesis. If there has been a failure on the part of the holder to notify prior parties, it would be absurd to say that any subsequent act, with knowledge of such failure, was *prima facie* evidence that there was no such failure. These authorities declare that where the presumption of notice, arising from the subsequent promise, is overcome by countervailing evidence, the promise ceases to have any binding effect upon the promisor, for the reason that it is without consideration and void.[2]

§ 967. **Subsequent Promise a Waiver.**— The mere acknowledgment of indebtedness has also been taken as evidence of due notice; but it was probably so held upon the ground that such acknowledgment was equivalent to a promise to pay what was admitted to be due.[3] In Chapman *v.* Annett,[4] however, it was expressly decided, where the drawer of a bill defended against a subsequent party, upon the ground that he had not received due notice of the

[1] Hussey *v.* Freeman, 10 Mass., 84.

[2] Lawrence *v.* Ralston, 3 Bibb, 102; Donelly *v.* Howie, Hayes & J., 436; Huntington *v.* Harvey, 4 Conn., 124.

[3] Jones *v.* O'Brien, 26 E. L. & Eq., 283; Rogers *v.* Hackett, 21 N. H., 100.

[4] 1 Carr. & Kir., 552.

dishonor of the bill, that a promise by such drawer, after the dishonor of the bill, to pay the same, did not amount to an admission of notice, but might waive it.

§ 968. **Even Written Admission Not Conclusive.**— It has also been held that even a written admission by the indorser, of due notice, or of liability on his indorsement, after dishonor, is not conclusive upon the party making it.[1]

§ 969. **Subsequent Promise Either Waiver or Admission.**— In Tebbetts *v.* Dowd,[2] Judge Cowen, in pronouncing the opinion of the court, lays down the doctrine that a subsequent promise, made with knowledge of laches of the holder in neglecting to give notice, would amount to a waiver of such notice. In this case, the judgment of the court below is also sustained, on the ground that, no laches appearing in the proof, the promise or other equivalent act of the drawer or indorser should be received as *prima facie* evidence of due notice. In so deciding this case, the earlier case of Trimble *v.* Thorn,[3] where a different doctrine was announced, was expressly overruled.

§ 970. **Onus Probandi.**— This brings us to the consideration of the question of the *onus probandi*, when the controversy is between two parties to a note or bill, the prior of whom has not been duly notified of the dishonor of the instrument, and the subsequent party seeks to hold him upon his promise made after dishonor. Primarily, as to the question of notice, the burden of proof rests upon the party who seeks to charge the other. But when there has been a promise to pay, or other act of the prior party by which it is claimed that notice is waived after dishonor, the authorities are by no means agreed as to whether the subsequent party shall be required to prove that the promise was made with knowledge of the laches, or the burden shall rest upon the party claiming to be discharged by the failure, of

[1] Commercial Bank *v.* Clark, 28 Vt., 325; Stix *v.* Mathews, 63 Mo., 371.
[2] 23 Wend., 379. See, also, Breed *v.* Hillhouse, 7 Conn., 523.
[3] 16 Johns., 152.

proving, not only the neglect or omission, but his own ignorance of such fact at the time of the promise.

§ 971. **Subsequent Promise Prima Facie Evidence of Diligence.**— In Tebbetts *v.* Dowd,[1] the *onus* seems, by the subsequent promise, to be shifted from the holder to the indorser. If the promise to pay is *prima facie* evidence of due diligence on the part of the holder, it relieves the latter of proving in the first instance a fact upon which the liability of the indorser is clearly dependent.

§ 972. **Evidence of Knowledge of Laches.**— In Loose *v.* Loose,[2] it was decided that a subsequent promise to pay would raise a presumption that the drawer or indorser by whom the promise was made was cognizant of the laches of the holder, which his promise was alleged to have waived. The judge who rendered the opinion in this case cites with approval the case of Tebbetts *v.* Dowd, where, as we have already seen, the promise was regarded as *prima facie* evidence that there had been due notice of the dishonor. It is difficult to understand how the same fact may raise a presumption of two antecedent facts so utterly inconsistent with each other, as that notice was duly given by the holder, and that the indorser had full knowledge that the holder had failed to give due notice.

§ 973. **Onus Cast Upon the Holder.**— On the other hand, it has been decided that in all instances the holder assumes the burden of proving notice, or such promise or other conduct of the indorser as would amount to a waiver of notice.[3]

§ 974. **Principles Governing the Question.**— There may be cases in which it would be more equitable to require the proof of negligence to be made by the indorser who has

[1] 23 Wend., 379.

[2] 36 Pa. St., 538. See, also, Chitty on B., 500; 3 Kent's Com., 113; Nash *v.* Harrington, 1 Aik., 49; Dorsey *v.* Watson, 14 Mo., 59; Walker *v.* Laverty, 6 Munf., 487.

[3] Walker *v.* Rogers, 40 Ill., 278; United States Bank *v.* Southard, 17 N. J. Law, 473.

promised to pay the note after its dishonor. There may be others where the promise fairly raises a presumption that there has been no negligence on the part of the promisee. But when we consider the importance of uniformity in the rules governing transactions in commercial paper, and that the notice by a holder to an indorser has come to be considered as one of the most important steps in fixing the liability of indorsers, the exceptional character of the rules as to waiver of notice, and that the waiver is only by implication, it seems to be adding unnecessarily to the confusion by which the cardinal principles of this important branch of the law have become obscured, to introduce an exception to the ordinary rules of evidence by which such cases have been governed, in order to give to words spoken with such a questionable intent, a scope so far beyond their necessary meaning. In looking at the question free from the bias of a particular case, it would seem that the promise to pay, subsequent to the dishonor of the note, would be evidence of a strong character that the indorser *believed* that notice had been previously given, while the tendency of such promise to establish the correctness of that belief would be in some cases so slight as to be scarcely appreciable. The sufficiency of the notice in point of time, when governed, as we have seen in a former part of this chapter,[1] by the date of sending, and not by the date of its receipt, is a matter the knowledge of which is peculiarly with the holder, and not with the indorser. To consider the promise as evidence of a belief in the diligence of the subsequent party in giving notice, and to deny to it the effect of raising a presumption that the holder had in fact given due notice, is to regard such promise as but a link in the chain of evidence by which the waiver is to be established, and not as a fact of such importance as to shift the *onus probandi* with respect to the question of notice from the shoulders of the holder to those of the antecedent party. If the holder fails to

[1] *Ante*, §§ 793, 821.

prove due notice of dishonor, and merely proves a subsequent promise, without other evidence of knowledge than could be inferred from the indorser's manifest belief that notice was given, it would seem that instead of having the effect of charging the indorser, it points to his discharge for want of notice, and would show that the subsequent promise was made in ignorance of that fact.

§ 975. Knowledge of Facts and Not Their Legal Effect. The knowledge of dishonor and of the failure by the subsequent party to give the requisite notice, when brought home to the antecedent party who has promised to pay the dishonored paper, is only required to be of the facts involved in the matter, and not of their legal effect.[1] And the knowledge of facts may be inferred from circumstances.[2]

§ 976. Excuses of a General Nature Enumerated.— And next, as to what will constitute a sufficient excuse for the omission of due notice of dishonor. Judge Story enumerates the excuses of a general nature for failure to give notice of dishonor of promissory notes as follows: "1. The cases where notice is prevented by inevitable accident, or overwhelming calamity. 2. The prevalence of a malignant disease, which interrupts and suspends the ordinary operations of trade and business. 3. Occurrences of a public and political character, which interrupt or stop the course of the trade and business, such as war, blockade of the place, invasion or occupation by the enemy. 4. The public interdiction or prohibition of commerce between the countries from which or to which the notice is to be sent. 5. The utter impracticability of giving notice by reason of the party entitled thereto having absconded, or having no

[1] Ladd *v.* Kenney, 2 N. H., 340; Duryee *v.* Dennison, 5 Johns., 248; Donaldson *v.* Means, 4 Dall., 109; Miller *v.* Hackley, 5 Johns., 375; Griffin *v.* Goff, 12 Johns., 423; Stevens *v.* Lynch, 12 East, 38; Porter *v.* Rayworth, 13 East, 417; Lundie *v.* Robertson, 7 East, 231; Bilbie *v.* Lumley, 2 East, 469; Hopley *v.* Dufresne, 15 East, 275. *Contra,* Warder *v.* Tucker, 7 Mass., 449.

[2] Givens *v.* Merchants' National Bank, 85 Ill., 442. See Metz *v.* Osborn, 5 Mo., 546; Dorsey *v.* Watson, 14 Mo., 62.

fixed place of residence, or his place of residence or business being unknown, and incapable of being ascertained upon reasonable inquiries."[1]

§ 977. **Excuses of a Special Character.**— Excuses of a special and peculiar nature are enumerated as follows: "1. That the note was given for the accommodation of the indorser only, and that he has the sole interest in the payment, and must ultimately pay the same. 2. An original agreement on the part of the indorser, made with the maker or other party, at all events to pay the note at its maturity to the holder. 3. The receiving of a security or indemnity from the maker or other party for whose benefit the note is made, by the indorser, to secure him for his liability thereon. If the security be to the full amount of the note, the indorser will be held liable, without notice, for the full payment of the note. If the security be partial, he will be bound *pro tanto*. 4. *A fortiori*, the receiving money from the maker or other party for whose benefit the note was made, to take up and pay the note. 5. Receiving the note as collateral security for another debt where the debtor is no party to the note, or, if a party, has not indorsed it. 6. An original agreement by the indorser to dispense with the necessity of notice, or to be bound without notice. As if the indorser, before the note becomes due, agrees to pay it in consideration of time being given to him, such a promise is a dispensation with the necessity of presentment for payment and of notice of the dishonor. 7. An order or direction from the indorser to the maker not to pay the note if it be presented at its maturity, for this plainly will dispense with notice of the dishonor, since it is procured by the indorser's own act, although it will not dispense with the presentment of the note for payment."[2] Many of the matters enumerated above as excuses of a special nature have been considered as amounting to waiver of notice.[3]

[1] Story on Prom. Notes, §§ 258, 259, 356; Story on B., §§ 308, 309.

[2] Story on Prom. Notes, §§ 293, 357; Chitty on Bills, 500 (9th Lond. Ed.).

[3] *Supra*, § 933, *et seq.*

§ 978. **Inevitable Accident.**— Inevitable accident will excuse notice when the happening of the event is beyond the control of the party charged with the duty of giving notice, although the accident may have resulted from the negligence of a stranger. As where, through a mistake of the postmaster, the bill failed to reach the agent authorized to present it for payment, until the day following the date of its maturity, it was held that notice given as soon as possible after presentment would be sufficient.[1]

§ 979. **Prevalence of Malignant Fever.**— The prevalence of a malignant fever in New York, that being the place of payment, by which the transaction of business was interrupted, was held to be sufficient to excuse delay in giving notice, which was due in September, until the following November.[2]

§ 980. **Existence of War.**— The existence of war is accepted as an excuse for failure to present for acceptance or demand payment and give notice of dishonor, where war has been formally declared between the belligerent nations, before the inception of the bill or note, for the reason that all contracts between the subjects of nations at war with each other are void.[3]

§ 981. **Interdiction of Commerce.**— So, when the instrument matures after the commencement of hostilities and the interdiction of commerce between the two countries, though it may have been made or drawn prior to the commencement of the war, the want of demand and notice would be excused.[4]

§ 982. **Actual Hostilities.**— The prevalence of actual hostilities, however, not only has the effect to excuse the giving of notice, because of the illegality of such business

[1] Windham Bank *v.* Norton, 22 Conn., 213.

[2] Tunno *v.* Lague, 2 Johns. Cas., 1.

[3] United States *v.* Grossmayer, 9 Wall., 72; Harden *v.* Boyce, 59 Barb., 425; Willison *v.* Pattison, 7 Taunt., 439; Potts *v.* Bell, 8 T. R., 548.

[4] Leathers *v.* Commercial Ins. Co., 2 Bush, 296; Hopkirk *v.* Page, 2 Brock., 20; Griswold *v.* Waddington, 15 Johns., 57; Scofield *v.* Eichelberger, 7 Pet., 586; Story on Prom. Notes, § 262.

intercourse between the subjects of the belligerents, but because of the obstruction to the means of communication, which renders either the presentment or the giving of notice practically impossible, dangerous or extremely inconvenient.[1]

§ 983. **Late War.**— This doctrine has been frequently applied to cases arising during the late civil war in this country, and it was decided, in several instances, that during the continuance of such war, and especially after the issuance of the president's interdict, all commercial intercourse between the people of the states remaining loyal to the national government and those in insurrection was suspended, and omissions to give due and regular notice of the dishonor of commercial paper between them was held excused, either on account of the difficulties of intercommunication or the prohibitory order of the president, or by reason of both such facts.[2]

§ 984. **Interruption of Postal Communication.** — When notice is given by sending a written communication through the postoffice, addressed to the party to be notified, at his residence, within the other belligerent's territory, or at a point between which and the place of dishonor there is no postal communication, which has been suspended by reason of the disturbed condition of the country, such notice will not operate to charge the party so notified, by converting his conditional liability into an absolute one.[3]

§ 985. **War Where Note Payable.**— The existence of war in the country where the bill or note is to be presented for payment or acceptance, although all the parties be residents of such country, will excuse the failure to give notice,

[1] Apperson *v.* Bynum, 5 Coldw., 341; Patience *v.* Townley, 2 J. P. Smith, 223; Story on Prom. Notes, § 261.

[2] House *v.* Adams, 48 Pa. St., 261; Woods *v.* Wilder, 43 N. Y., 164; Berry *v.* Southern Bank of Ky., 2 Dev., 379; Bell *v.* Hall, id., 288; Bellgerry *v.* Branch, 19 Gratt., 393; Hayden *v.* Boyce, 59 Barb., 425; Polk *v.* Spinks, 5 Coldw., 431.

[3] James *v.* Wade, 21 La. An., 548; Durden *v.* Smith, 44 Miss., 548; Shaw *v.* Neal, 19 La., 156.

when, by reason of the existence of such war, there is a military occupation of the country which obstructs intercourse between the parties to the note or bill.[1]

§ 986. Not Excused if Intercourse Legal.—It has been held that unless it was apparent that, at the time of the protest, there was such obstruction to communication that the notice could not have been sent, if prior to the president's interdict, the intercourse was not illegal, and notice was not excused.[2]

§ 987. Loss of Note by War, No Excuse.—Nor will the mere fact that, as one of the casualties of war, the note has been lost or removed beyond the reach of the legal holder, be sufficient to excuse notice. The loss or absence of the note, when occasioned by war, will furnish no better excuse for a failure to present and give notice of dishonor than any similar casualty which is the effect of any other cause. So, where the notes, being held by a bank in Memphis, were, by the order of the commander of the Confederate forces, removed south about the 20th day of May, 1862, and remained south until the close of the war in 1865, it was held that the protest which took place July 17, 1865, and notice thereof given to an indorser, who, together with the officers of the bank, had resided in the city of Memphis throughout the war, would not be effectual to fix the liability of such indorser, who was discharged by the laches of the bank officers.[3]

§ 988. Entitled to Notice When Obstruction Removed. Where notice, which otherwise should be sent by mail, is interrupted by a state of war between the countries in which the prior and subsequent parties are respectively resident, or in either of such countries, it is not to be understood that notice is thereby finally dispensed with. Upon a cessation of the war, or the removal of other similar obsta-

[1] Peters *v.* Hobbs, 25 Ark., 67; Dunbar *v.* Tyler, 44 Miss., 1; Farmers' Bank of Va. *v.* Gunnel, 26 Gratt., 131; Tardy *v.* Boyd, id., 631.

[2] National Bank *v.* Marr, 6 Bush (Ky.), 614.

[3] Apperson *v.* Union Bank, 4 Coldw., 445.

cles to the regular communication by mail, the prior party becomes entitled to notice, and it should be sent as soon as practicable.[1]

§ 989. **Party Not Required to Violate Law of His Domicile.**—Excuse founded upon the public interdiction and prohibition of commercial intercourse has been sufficiently illustrated by examples from the authorities cited with respect to war between the countries in which the different parties reside. War furnishes the most familiar, if not the only, instance where commerce between different countries is interdicted. But one of the reasons for the excuse would be the same where intercourse was prohibited in time of peace, as no subject or resident of any country can be compellable to do an act which violates the law of his domicile, in order to protect rights which he is not otherwise at liberty to enforce.[2]

§ 990. **Due Diligence.**—All that is required of the holder, in giving notice to prior parties of the dishonor of a bill or note, is the exercise of diligence in making inquiry for the residence or place of business of the party to be notified, and if, after proper inquiries, such place cannot be ascertained, or if the indorser has absconded, or concealed himself, or has no regular place of residence or business, notice will not be required, at least not within the usual time.[3]

§ 991. **Notice of Facts Excusing Demand.**—But the absconding, absence or insolvency of the maker of a note, or the acceptor or drawer of a bill, even when they excuse presentment or demand, will not excuse notice, notwithstanding such circumstance is known to the indorser or

[1] Morgan *v.* Bank of Louisville, 4 Bush, 83.

[2] Story on Prom. Notes, § 263.

[3] Brighton Market Bank *v.* Philbrick, 40 N. H., 506; Browning *v.* Kinnear, Gow., 81; Baldwin *v.* Richardson, 1 Barn. & Cres., 245; Firth *v.* Thrush, 8 id., 387; Peet *v.* Zanders, 6 La. An., 364; Bateman *v.* Joseph, 2 Camp., 461; Garver *v.* Downies, 33 Cal., 176; Lambert *v.* Ghiselin, 9 How., 552; Chapman *v.* Lipscombe, 1 Johns., 294; Hunt *v.* Maybee, 7 N. Y., 266.

other prior party to be affected by the notice.[1] The indorser or drawer is as clearly entitled to notice of facts which excuse presentment for acceptance or demand of payment as he is to notice of dishonor.[2]

§ 992. **Obstructions Removed — Demand and Notice.**— Nevertheless, where the facts are sufficient to excuse delay in presenting the bill, the notice may, in some instances at least, be effectually given after the obstruction is removed and the presentment or demand is made; as where the sickness or death of the holder intervenes to prevent the demand being made at maturity. It was accordingly held that the sickness of the holder of a bill payable three days after sight would be excused for failing to present the bill within such time as would otherwise be deemed reasonable.[3]

§ 993. **Death of Holder.**— Where the holder died before the maturity of the note, and his executor proved the will within a month after the maturity of the note, but immediately thereafter relinquished his trust as executor without having qualified as such, and his successor in the administration found the note among the papers of deceased a week after he received them, presented it next day, and notified the indorser the day after of the dishonor, it was held that the notice of dishonor was given within a reasonable time.[4]

§ 994. **Sudden Sickness and Death of Agent.**— The sudden sickness and death of an agent of the holder, who had the note in his possession, has also been accepted as an excuse for delay.[5] In this case the holder was not aware of

[1] Farnum *v.* Towle, 12 Mass., 92; Denny *v.* Palmer, 5 Iredell, 610; May *v.* Coffin, 4 Mass., 341; Nash *v.* Harrington, 2 Aikens, 9; Russell *v.* Langstaffe, Dougl., 495; Smith *v.* Beckett, 13 East, 187; Esdaile *v.* Sowerby, 11 id., 114; Pons *v.* Kelley, 2 Hayw., 45; Warrington *v.* Furbor, 8 East, 242; Nicholson *v.* Gouthit, 2 H. Bl., 609; Rhode *v.* Proctor, 4 B. & C., 517; Thackery *v.* Blackett, 3 Camp., 164; Lafitte *v.* Slatter, 6 Bing., 623.

[2] Price *v.* Young, 1 M'Cord, 339; Taylor *v.* Snyder, 3 Den., 145.

[3] Aymar *v.* Beers, 7 Cow., 705.

[4] White *v.* Stoddard, 11 Gray, 258.

[5] Duggan *v.* King, Rice, 1239.

the notes being in the possession of his agent at the time of his decease, and, as soon as it was discovered, demand was made and notice of dishonor given. Under these circumstances, a notice which otherwise should have been given on the 15th day of May was held to be in due time when given on the 8th of the following June.

§ 995. **Sickness Must be Sudden and Severe.**— Sickness, however, will only be sufficient excuse for negligence in making demand and giving notice of non-payment, when it appears to have been so sudden and severe as to prevent the holder, or agent who has possession of the instrument, from presenting the same, or employing another to do so in his stead.[1]

§ 996. **Special Excuses Treated as Waiver.**— The classification and enumeration of excuses of a special nature as laid down by Judge Story[2] cannot be followed here without a great deal of useless repetition, for the reason that most of the matters there given by the learned author as *excusing* notice, we have already presented as matters of *waiver*.[3]

§ 997. **Bill Drawn for Benefit of Drawer.**— Notice may be excused by the fact that the bill or note was drawn or made for the benefit of the drawer, maker, or indorser, who would otherwise be entitled to notice. It was accordingly held that where the bill was drawn and accepted for the benefit of the drawer, there was no necessity of giving him notice of its dishonor, as the duty was incumbent upon him to take care of the bill.[4]

§ 998. **Note for Accommodation of Payee.**— Even where the maker of the note was really indebted to the payee, but the note was made for the accommodation of the payee, who indorsed it, and promised the indorsee that

[1] Wilson *v.* Senier, 14 Wis., 380.

[2] *Supra*, § 977.

[3] *Supra*, §§ 933, 934 *et seq.*

[4] N. O. Sav. Bank *v.* Harper, 12 Rob. (La.), 231; Ross *v.* Bedell, 5 Duer, 462; Barbaroux *v.* Waters, 3 Metc. (Ky.), 304; Sharp *v.* Bailey, 9 Barn. & Cres., 44; *Ex parte* Heath, 2 Ves. & B., 240.

he would take care of it, he was not entitled to notice of dishonor.[1]

§ 999. **For Accommodation of Drawee or Acceptor.**— But where the bill is drawn for the accommodation of the drawee or acceptor, the rule is quite different. Being drawn for the benefit of the party to whom the holder is directed for payment in the first instance, in case of failure on his part to meet the obligation when presented, for whatever reason that does not involve the interference of the prior party, such prior party is entitled to notice.[2]

§ 1000. **Not Excused by Promise of Drawer to Provide for Bill.**— The English courts seem very jealous of encroachments upon the general rule requiring notice to prior parties of the dishonor of commercial paper. Lord Kenyon, in Staples *v.* Okines,[3] where the drawee was in debt to the drawer above the amount of the bill, but had informed the drawer that he could not meet the bill, and it was understood between them that the drawer should provide for it in case it was not paid, it was held that the drawer was nevertheless entitled to notice.[4]

§ 1001. **No Funds in the Hands of Drawee.**— It is frequently urged as an excuse for the want of notice of dishonor of bills of exchange, that when the draft is drawn the drawee has no funds in his hands which belong to the drawer, and as a consequence the drawer cannot be injured by the omission. The earliest reported case in which this rule is laid down, and which seems to be followed as an authority, is that of Bickerdike *v.* Bollman.[5] In rendering the opinion Judge Buller says: "The law requires notice to be given for this reason, because it is presumed that the

[1] Torrey *v.* Foss, 40 Me., 74.

[2] *Ex parte* Heath, 2 Ves. & B., 240; Bank of Seaford *v.* Connoway, 4 Houst., 206.

[3] 1 Esp., 332.

[4] This, however, has been held differently in a recent American case, which seems to be supported by the better reason. Harrison *v.* Trader, 29 Ark., 85.

[5] 1 T. R., 405, 409.

bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for the want of notice."[1]

§ **1002. Application of the Rule Confined.**— The above decision may be regarded as the foundation of a rule which, with the modifications found necessary in its application to cases where the facts were different, has been accepted by the courts, both American and English, as based upon a salutary principle. Though there has never been a doubt expressed of the soundness of the decision in the case where this doctrine is first distinctly and authoritatively announced, some of the English judges, in giving in their adhesion to the precedent, apprehending a disturbance of the established rules of the law merchant upon the subject of notice, have expressed their regret at what they regarded as a dangerous departure.[2] Viewing this as an exceptional case, when cited as a precedent, the tendency has been to confine its application to cases clearly in point, and not to extend it to cases possessing the single characteristic in common with Bickerdike *v.* Bollman, that the drawee held no funds of the drawer. In modifying the rule the courts have also found it necessary to place it upon a foundation less broad than the mere fact that the drawer would not be injured by the neglect or omission of the holder to give notice of the dishonor, as it would open an almost endless field of inquiry, if in every case the holder might go into an elaborate and nice investigation of the question whether the failure to give notice had been productive of actual damage to the party entitled thereto under the established rule.

§ **1003. American Cases Decided on Insufficient Reason.**— In some of the American authorities, however, the absence of injury to the drawer is given as the only reason

[1] See, also, Rogers *v.* Stephens, 2 T. R., 713; Gale *v.* Walsh, 5 id., 239; Walwyn *v.* St. Quintin, 1 Bos. & Pul., 654; Dickens *v.* Beal, 10 Pet., 572.

[2] See cases cited *infra.*

of the exception to the general rule, and it is announced that a failure to give notice will not discharge the drawer without funds, even where the bill has been duly accepted, and only dishonored when presented for payment.[1] The reasoning of most of these cases is hardly satisfactory, in view of the necessity for fixed rules to be applied to particular cases, without enlarging the scope of inquiry into facts.

§ **1004. No Right to Expect Payment.**— The preponderance of authority, both British and American, is in favor of treating the absence of funds not as sufficient in itself to excuse notice to the drawer, upon the broad ground that he is not injured by the omission, but as evidence of the fact upon which the true reason of the exceptional doctrine is based — that the drawer had no right to expect that the bill would be accepted and paid, and hence its circulation by the drawer would be either a fraud upon subsequent parties, or an indirect means of evidencing his own indebtedness.[2]

§ **1005. Drawer Against Goods in Transit.**— So, where the drawer has made or is making a consignment of goods to the drawee, and draws before the consignment comes to hand,[3] if the goods are *in transitu*, but there is a failure to send a bill of lading, or the goods are lost; if the drawer

[1] Hoffman *v.* Smith, 1 Cai., 160; Commercial Bank *v.* Hughes, 17 Wend., 94; Foard *v.* Womack, 2 Ala., 368; Shirley *v.* Fellows, 9 Port. (Ala.), 300.

[2] Rucker *v.* Hiller, 16 East, 43; Norton *v.* Pickering, 8 B. & C., 610; Cory *v.* Scott, 3 Barn. & Ald., 619; Walwyn *v.* St. Quintin, 1 Bos. & Pul., 654; Blackham *v.* Doren, 2 Camp., 503; Lord Ellenborough in Brown *v.* Maffey, 15 East, 216; Legge *v.* Thorpe, 12 id., 171; Lafitte *v.* Slatter, 4 Moore & P., 457; Dickens *v.* Beal, 10 Pet., 572; French *v.* Bank of Columbia, 4 Cranch, 141; Louisiana State Bank *v.* Buhler, 22 La. An., 83; Oliver *v.* Bank of Tennessee, 11 Humph., 74; Kinsley *v.* Robinson, 21 Pick., 327; Campbell *v.* Pettengill, 7 Me., 126; Hopkirk *v.* Page, 2 Brock., 20; Miser *v.* Trovinger, 7 Ohio St., 281; McRae *v.* Rhodes, 22 Ark., 315; Schuchardt *v.* Hall, 36 Md., 590; Farmers' Bank *v.* Vanmeter, 4 Rand., 553.

[3] Oliver *v.* Bank of Tennessee, 11 Humph., 74; Robins *v.* Gibson, 3 Camp., 334.

has any property for sale in the hands of the drawee; if there be a fluctuating balance between the drawer and the drawee, in the course of their transactions; if the drawee has been in the habit of accepting the bills of the drawer, without regard to the state of their accounts, or the drawer has a reasonable expectation that the bill will be accepted or paid, the transaction cannot be denominated a fraud, and the drawer is entitled to notice.[1]

§ **1006. Opinion of Marshall.**— In Hopkirk *v.* Page,[2] there was a balance in the drawee's hands, amounting to 16*s.* 11*d.*, and the draft was for £246 3*s.* 7*d.*, with no expectation, which seemed to have any reasonable grounds, that the bill would be paid; it was held, by Chief Justice Marshall, that notice was unnecessary. "The sound sense and justice of the exception," said the learned judge, "is that where a drawer knows that he has no right to draw, and has the strongest reason to believe his bill will not be paid, the motives for requiring notice do not exist, and his case comes within the reason of the exception. Where all transactions between parties have ceased, and there is nothing to justify a draft but a balance of one penny, it would be sporting with our understanding to tell us that a creditor for this balance, who should draw for a thousand pounds, would be in a situation substantially different from what he would be in were he the debtor in the same sum."

§ **1007. Illustration.**— An example of a draft without reasonable expectation of payment is where the drawer was engaged in executing a contract, through an agent in a distant city, and the drawee acted as his trustee to receive the money to be paid on the contract, and pay it out on the drawer's order. The drawee had written the other party, urging the completion of the work, and advising him that no further money would be paid until the work was all finished. The draft was drawn subsequent to this advice, and it was held that notice was unnecessary.[3]

[1] Dickens *v.* Beal, and other cases cited in note to § 1004.

[2] 2 Brock., 20. See, also, Blankenship *v.* Rogers, 10 Ind., 333.

[3] Wollenweber *v.* Ketterlinus, 17 Pa. St., 389.

§ **1008. Mere Existence of Credit.**— So the mere fact of the existence of a credit in the drawer's favor will not always furnish reasonable grounds for expecting that the bill will be paid. As where the drawer had supplied the drawee with goods on a credit, which did not expire until long after the maturity of the bill, and had no funds in the hands of the drawee, and no further reason to anticipate the payment of the bill, it was held that he was not entitled to notice of protest.[1]

§ **1009. Expectation of Payment Must Continue to Maturity.**— It is not sufficient to discharge a drawer who has not received notice of dishonor, that at the time the bill was drawn he had sufficient funds to meet it in the hands of the drawee, or had good reason to anticipate its payment. The reasonable expectation of payment must continue down to the maturity of the bill. So, where the drawer of a draft or check withdraws his balance from the hands of the drawee before the bill matures, or the check is presented, he is not entitled to notice of non-payment, as a condition precedent to his liability.[2] But if, at the maturity of the bill, the holder have a reasonable expectation that it will be paid, notice to him cannot be dispensed with,[3] although the funds in the hands of the drawee may not be sufficient in amount to pay the draft.[4]

§ **1010. Need Not be Anticipated from Drawee.**— The reasonableness of the expectation will not depend upon the fact that payment is anticipated as coming directly from the drawee. If he has reason to believe that some one else will have supplied the drawee with funds at the maturity of the bill, and for a failure to make such provision the

[1] Claridge *v.* Dalton, 4 Maul. & Sel., 226.

[2] Purchase *v.* Mattison, 6 Duer, 587; Jacks *v.* Darrin, 3 E. D. Smith, 557; Sutcliffe *v.* McDowell, 2 Nott & McC., 251; Lilley *v.* Miller, id., 257; Eichelberger *v.* Finley, 7 Harr. & J., 381; Valk *v.* Simmons, 4 Mason, 113; Moody *v.* Mack, 43 Mo., 210; Morrison *v.* McCartney, 30 Mo., 183; Adams *v.* Darby, 28 Mo., 162; Linville *v.* Welch, 29 id., 203.

[3] Legge *v.* Thorpe, 12 East, 171.

[4] Orr *v.* McGinness, 7 East, 359.

drawer would have a right of action against the one so failing, notice to the drawer would be necessary.[1]

§ 1011. **Promise from Drawee.**— Where the drawer had received from the drawee a promise to meet the draft, if he did nothing thereafter to prevent the funds coming to the hands of the drawee, he might reasonably rest in the belief that the bill would be paid at maturity, although he knew that the funds in the hands of the drawee were not sufficient to meet the draft.[2]

§ 1012. **Where Drawee Has Already Honored Drafts.**— So, where an acceptance was given by a drawer upon a drawee, who had already honored several drafts from the same source, although he held none of the drawer's funds, the drawer would be entitled to notice, upon the ground of reasonable expectation of payment, provided the former bills had been honored without funds, and there had been no understanding between the parties limiting the transactions to the prior acceptances.[3]

§ 1013. **Running Account Between Parties.**— So, also, has it been held that, where there is a running account between the parties, any sum whatever standing to the credit of the drawer will justify the expectation of payment, so far as to entitle him to notice of dishonor.[4]

§ 1014. **Suspecting Absence of Funds, No Excuse.**— Where the holder made inquiry of the drawee on the day preceding the day of maturity, and ascertained that funds had not been provided for the payment of the bill, but was informed by the drawer that it was probable that a sufficient amount would be supplied in time, and on the day of maturity the drawer saw the holder and told him he would see what could be done, it was held that he was entitled to due notice, regardless of whether the funds were in the hands of the drawee or not. And the holder, suspecting the continued

[1] Brown *v.* Maffey, 15 East, 216; Lafitte *v.* Slatter, 6 Bing., 623.
[2] Orear *v.* McDonald, 9 Gill, 350.
[3] Spooner *v.* Gardiner, Ry. & Mood., 84.
[4] Hill *v.* Norris, 2 Stewart & P., 114.

absence of cash to meet the draft, and for that reason failing to present the same and give notice of its dishonor, the drawer was discharged by such omission.[1] Had the decision of this case turned upon the question whether the drawer was injured by the neglect of the holder to make presentment and give notice, it would doubtless have resulted differently.

§ 1015. Drawer Being in Debt to Drawee, No Excuse.— The circumstance that, according to the mutual accounts between the drawer and the drawee, the former is in debt to the latter, will not excuse notice of dishonor, where the drawer, notwithstanding the fact that the fluctuating balance is against him, has cash in the hands of the drawer to meet the specific draft.[2]

§ 1016. No Expectation of Funds at Place, No Excuse.— It is no excuse that the funds are not at the place of payment designated in the bill, and where such fact was pleaded in excuse, and that there was no reasonable expectation that the funds would be there, it was held insufficient, as there should have been an averment of no reasonable expectation of funds in the hands of the acceptor or drawee.[3]

§ 1017. No Excuse for Failing to Notify Indorser.— The consideration of want of funds, as an excuse for failure to give notice of dishonor, is necessarily confined almost exclusively to cases arising between subsequent parties to the bill and the drawer. The mere fact that the bill was drawn or a note made without funds to meet it, or without even a shadow of reason to expect that it would be paid at maturity, will not excuse a failure to give notice to an indorser, by whom the bill has been transferred in good faith.[4]

[1] Prideaux *v.* Collier, 2 Stark., 57.

[2] Blackhan *v.* Doren, 2 Camp., 503.

[3] Harwood *v.* Jarvis, 5 Sneed, 375.

[4] Wilkes *v.* Jacks, Peake, 267; Ramdulollday *v.* Darieux, 4 Wash. C. C., 61; Ralston *v.* Bullitts, 3 Bibb, 261; Scarborough *v.* Harris, 1 Bay, 177; Warder *v.* Tucker, 7 Mass., 449; Carter *v.* Flower, 16 M. & W., 743; Bogy *v.* Keil, 1 Mo., 743; Merchants' Bank *v.* Easley, 44 Mo., 286; Walker *v.* Rogers, 40 Ill., 278; Leach *v.* Hewitt, 4 Taunt., 731.

§ 1018. Accommodation Indorser.— And though the payee simply indorses the note to give it currency, and with full knowledge of the insolvency of the maker, he is nevertheless entitled to notice of non-payment at maturity.[1]

§ 1019. Indorser with Notice of Facts Excusing.— But an indorser of a bill of exchange, with notice of such facts as would be sufficient to excuse the want of notice to the drawer, whether it be that the bill was drawn without funds, or other circumstance from which the drawer would have no right to anticipate payment, would be placed upon substantially the same footing as the drawer, and whatever would suffice to excuse the omission to notify the latter, would be a valid excuse in case of an indorser with notice of the facts.[2]

§ 1020. Former Partnership Between Drawer and Drawee, No Excuse.— The indorsee and holder of a bill drawn by one upon a former partner, where the partnership between them had been recently dissolved, is not excused from giving notice of the dishonor of the bill, merely because he had not been notified of the dissolution. The notice of dissolution is only necessary when the partner professes to act for the partnership. In this case he professed to act for himself in drawing a bill in his own name, and the erroneous impressions of the holder, as to the relation subsisting between the drawer and the drawee, could not be allowed to affect the rights of the former, as a party to the bill.[3]

§ 1021. Partner Drawing Upon His Firm, Not Entitled to Notice.— But though it has been frequently decided that the drawer's or indorser's knowledge of the insolvency of the maker or drawee of a note or bill would be no excuse for failure to give notice of its dishonor,[4] the case is quite dif-

[1] Groton *v.* Dallheim, 6 Me., 476.

[2] Mobley *v.* Clark, 28 Barb., 390.

[3] Taylor *v.* Young, 3 Watts, 339.

[4] Sussex Bank *v.* Baldwin, 17 N. J. Law, 487; Miller *v.* Hackley, 5 Johns., 375; U. S. Bank *v.* Southard, 17 N. J. Law, 473.

ferent when the bill is drawn upon a copartnership by a member of the firm. There the fact of insolvency being known by the drawer at the inception of the bill, has been regarded as a virtual withdrawal of the funds.[1] And aside from the question of insolvency, a partner drawing upon the firm of which he is a member is not entitled to notice of dishonor, as he occupies the position on the bill of drawee, as well as drawer.[2] For the same reason, where a note is made by a partnership, in favor of another, and is indorsed by one who is an active member of both firms for the payee, it has been held that notice of dishonor was unnecessary to bind the indorser.[3]

§ 1022. Goods Purchased for Use of Firm Will Not Excuse.— But where the maker and the indorser of a note were partners, it was held that the latter was entitled to notice, although the consideration was goods purchased for the use of the firm in the conduct of their partnership business.[4]

§ 1023. Fraud by Indorser Excuses Notice.— Where the holder of a note made a valid and binding contract of extension with the maker, and then transferred the note by indorsement to a purchaser for value, before maturity, without notice of such contract of extension, he was held, by the perpetration of this fraud upon his indorsee, to have rendered notice of dishonor to himself, as indorser, unnecessary.[5]

§ 1024. Motives for Indorsement Immaterial.— The motives by which the indorser is actuated in becoming a party to the instrument cannot affect his right to notice, so long as the indorsement is not for his own accommodation, by which he becomes the substantial maker. He may be an

[1] Fuller *v.* Hooper, 3 Gray, 334.

[2] Gowan *v.* Jackson, 20 Johns., 176.

[3] Dwight *v.* Scovill, 2 Conn., 654; West Branch Bank *v.* Fulmer, 3 Pa. St., 399.

[4] Foland *v.* Boyd, 23 Pa. St., 476.

[5] Williams *v.* Brobst, 10 Watts, 111; Amoskeag Bank *v.* Moore, 37 N. H., 539.

indorser merely for the accommodation of the maker, or he may expect to gain some pecuniary advantage by assuming the liability; but neither of these circumstances will affect his *status* on the instrument, nor deprive him of the right to notice of dishonor.[1]

§ **1025. Adding the Word "Surety," No Excuse.**—Adding the word "surety" to the indorsement does not divest the party of the character of indorser, and hence does not dispense with the necessity for notice, as would be required where the indorsement was made without this addition. It merely gives him the advantages of the character of surety in addition to those of indorser.[2]

§ **1026. Presence of Indorser When Payment Refused, No Excuse.**— The personal presence of the indorser when demand of payment was made and the payment refused, has been held insufficient to excuse a failure to give notice of dishonor.[3]

§ **1027. Attachment of Funds, No Excuse.**— The attachment of the funds in the hands of the drawee, at the suit of a creditor of the drawer, has been held insufficient to excuse a failure of the holder to give the drawer notice of the nonpayment of a bill of exchange, notwithstanding the notice of attachment, which would bring to his knowledge circumstances calculated to render it impossible for the drawee to honor the draft at maturity without incurring the risk of a double liability.[4]

§ **1028. Note Void at Inception, Notice Unnecessary.**— Upon the ground that the indorsement is, in addition to the conditional undertaking to pay, an implied warranty of the genuineness of the instrument, it has been held that notice is not necessary to bind the indorser of a note which was void at its inception.[5]

[1] Seabury *v.* Hungerford, 2 Hill, 80.
[2] Bradford *v.* Corey, 5 Barb., 461.
[3] Grant *v.* Spencer, 1 Montana, 136.
[4] Stanton *v.* Blossom, 14 Mass., 116.
[5] Chandler *v.* Mason, 2 Vt., 193; Turnbull *v.* Boyer, 40 N. Y., 456.

CHAPTER XI.

PUBLICATION OF NOTICES.

I. Original Process.
II. Judicial Sales.
III. Non-judicial Involuntary Sales.
IV. Miscellaneous Proceedings.

I. Original Process.

§ 1029. General Character of Service by Publication.
1030. Must Conform to Statute.
1031. Suits in Which Generally Employed.
1032. Affidavit or Declaration.
1033. Must Aver Jurisdictional Facts.
1034. Should Allege Property Within State.
1035. Must Aver Cause of Action.
1036. Ground of Attachment.
1037. Attachment of Property.
1038. Requisites of Affidavit in New York.
1039. Example of Sufficient Affidavit in California.
1040. Averment of "Due Diligence" Held Sufficient.
1041. Difference in Statutes.
1042. Conclusions of Law Not to be Stated.
1043. Expression of Opinion Not Sufficient.
1044. Information and Belief.
1045. Sufficient Statement of Absence from State.
1046. Affidavit Attached to Other Papers.
1047. When Sufficiency of Affidavit Presumed.
1048. Not Impeachable in Collateral Proceeding.
1049. Averments in Pleading Same as in Affidavit.
1050. Amendment Not Allowed After Publication.
1051. Order of Publication and Notice.
1052. Who to Make the Order.
1053. Must be by Designated Officer.
1054. Change of Order Without Authority.
1055. Contents of the Order.
1056. Sufficient Recitals to Inform Defendant.
1057. Averment of Attachment in Notice.

§ 1058. Nature and Amount of Plaintiff's Demand.
1059. Foreclosure and Partition — Description.
1060. Names of Defendants.
1061. Unnecessary to Designate Statute.
1062. Order Must be Properly Signed.
1063. Should State Return Day.
1064. Publication.
1065. Newspaper.
1066. What is Newspaper?
1067. Published in Designated Paper.
1068. Substitute for Publication in Paper.
1069. Full Time.
1070. Computation of Time.
1071. Three Calendar Months.
1072. Three Weeks Successively.
1073. Last Insertion Four Weeks Prior to Term.
1074. Six Weeks' Publication.
1075. When Time Cannot be Shortened.
1076. Days, Weeks or Months.
1077. Certain Time, or Certain Number of Times.
1078. Ten Publications in Ten Weeks.
1079. Two Weeks in Daily Paper.
1080. Proof of Publication.
1081. To Satisfaction of Court.
1082. Affidavit Not Conclusive.
1083. Divorce and Alimony.
1084. Judgment Binds Property.
1085. Judgment Not Subject to Collateral Attack.

§ 1029. General Character of Service by Publication. Publication is a means authorized by statute in most, if not all, the states of the Union, for obtaining constructive service of process, when from the non-residence, absence from the state, or absconding of the defendant, a more direct mode of service becomes impracticable. Service of summons in this manner is called *constructive*, not because the publication in the manner prescribed by statute raises any reasonable presumption that thereby the defendant is advised of the pendency of the suit, for its authorization is not confined to cases where there is even a possibility of its ever coming to the knowledge of the party to be affected. The defendant may have removed so far beyond the con-

fines of civilization that it would be impossible in the nature of things for the paper containing the first insertion of the notice to reach him before the return day, and it will still be as effective as though the paper came regularly to his hands.

§ 1030. Must Conform to Statute.— As this manner of serving process depends for its validity more upon its strict conformity to the statute by which it is authorized than upon any inherent probability of its conveying intelligence of the impending suit to the party whose rights are to be affected, the fact that it has actually come to the knowledge of defendant cannot be shown to supply any material deviation in the publication from what the statute prescribes. The statute, being in derogation of common law, is always strictly construed, and it must be shown affirmatively that its provisions have been complied with.[1]

§ 1031. Suits in Which Generally Employed.— Parties may be effectually served by publication, in general, where the suit is brought by attachment, or to foreclose a mortgage or deed of trust, or otherwise to directly affect the title to property within the jurisdiction of the court.[2] This manner of service is also extensively used in suits for divorce.[3]

§ 1032. Affidavit or Declaration.— The first essential requisite to a valid publication of original process is the *affidavit*, return or declaration upon which the order is based. The allegations should be distinct and unequivocal, and should show the existence of a state of facts such as

[1] Scorpion S. M. Co. *v.* Marsano, 10 Nev., 370; Likens *v.* McCormick, 39 Wis., 313.

[2] People *v.* Huber, 20 Cal., 81; Cook *v.* Farren, 34 Barb., 95; Lawrence *v.* State, 30 Ark., 719; Gray *v.* Larrimore, 2 Abb. (U. S.), 542; Sexton *v.* Rhames, 13 Wis., 99; Lovejoy *v.* Lunt, 48 Me., 377; Zacharie *v.* Bowers, 3 Sm. & M., 641; Bobb *v.* Woodward, 42 Mo., 482.

[3] Jarvis *v.* Barrett, 14 Wis., 591; Pomeroy *v.* Betts, 31 Mo., 419; Wilson *v.* Ladd. 49 Me., 73.

would give the court or judge jurisdiction to order the publication.[1]

§ 1033. **Must Aver Jurisdictional Facts.**— It was accordingly held in Eastbrook *v.* Eastbrook,[2] that the affidavit should aver *diligence* in endeavoring to find the party to be served within the jurisdiction, and that the court could not be satisfied of the existence of the necessary jurisdictional facts by the certificate of the sheriff that he had reason to believe that the defendant was a non-resident, or was beyond the jurisdiction of the court.

§ 1034. **Should Allege Property Within State.**— So, where the affidavit stated that the defendant was a non-resident of the state, but failed to allege that he had property within the state, it was held insufficient to authorize the order of publication.[3]

§ 1035. **Must Aver Cause of Action.**— So, also, has it been held that the affidavit should show, by a sufficient statement of facts, the existence of a cause of action in favor of plaintiff and against defendant, and also the nature of such cause of action.[4]

§ 1036. **Ground of Attachment.**— Where the suit was brought by attachment, the affidavit was required to state, in addition to the nature of the cause of action between the parties, the non-residence, departure from state, concealment to avoid summons, or some one or more of the different grounds for attachment, and a failure in this respect, it was held, would render the judgment in pursuance of such service, utterly void.[5]

§ 1037. **Attachment of Property.**— So, where the affidavit failed to allege that the property of the defendant

[1] Bardsley *v.* Hines, 33 Iowa, 157; Merrill *v.* Montgomery, 25 Mich., 73; Schell *v.* Leland, 45 Mo., 289.

[2] 64 Barb., 421. See, also, Waffle *v.* Goble, 53 Barb., 517.

[3] Spiers *v.* Halstead, 71 N. C., 209.

[4] Claypole *v.* Houston, 12 Kan., 324.

[5] Braley *v.* Seaman, 30 Cal., 610; Riley *v.* Nichols, 1 Heisk. (Tenn.), 16.

had been attached in the suit, the defect was considered fatal to the judgment, as this was a fact necessary to the jurisdiction of the court.[1]

§ 1038. Requisites of Affidavit in New York.—The essential requisites of the affidavit for an order of publication under the laws of the state of New York, as laid down in Bixby *v.* Smith,[2] are: 1. That defendant cannot after due diligence be found in the state. 2. That a cause of action exists in favor of plaintiff and against such defendant, or that defendant is a proper party to an action relating to property within the state. 3. That defendant is a non-resident of the state. And where the affidavit upon which the order was made averred diligence on his part and proper efforts to find defendant, but that he could not be found in the state, this was held a sufficient statement, as to the non-residence of the defendant, to warrant the issuing of the order of publication.[3]

§ 1039. Example of Sufficient Affidavit in California. In a case arising under the California statute, it was held, where the affidavit stated that defendant had absented himself from his place of abode on the day before the commencement of the suit, informing his servant that he would return on the following day, that he could not be found by the officer, who made diligent search for him, and affiant believed that defendant concealed himself for the purpose of avoiding summons, and that the claim sued on was a just debt, that this was sufficient to justify the order.[4]

§ 1040. Averment of Due Diligence Held Sufficient.—Where the affidavit stated that the defendant could not, "with due diligence, be found within the state," it was held not defective for failing to allege with particularity

[1] Drake *v.* Hale, 38 Mo., 346; Riley *v.* Nichols, 1 Heisk. (Tenn.), 16. But see Dronillard *v.* Whistler, 29 Ind., 552, where it is held that the affidavit need not mention the attachment.

[2] 9 How. Pr., 50; S. C., 5 Thompson & C., 281.

[3] Simpson *v.* Burch, 6 Thomp. & C. (N. Y.), 560; S. C., 4 Hun, 315.

[4] Seaver *v.* Fitzgerald, 23 Cal., 85.

what efforts had been made to find defendant within the state.[1]

§ 1041. **Difference in Statutes.**— The statutes of the different states vary materially with respect to the affidavit. In some of them the allegation of non-residence is not sufficient without the further statement that the defendant could not be found within the state,[2] while in others it seems sufficient to state that defendant is not a resident of the state.[3]

§ 1042. **Conclusions of Law Not to be Stated.**— The decisions are by no means uniform upon the question of what is a sufficient allegation of diligence in the affidavit. Under a statute requiring that it should appear by affidavit to the satisfaction of the court or officer that personal service could not be had within the state, it was held that the words "appear by affidavit" meant that the affidavit should allege such matters as would amount to legal evidence of the fact, and would be received in the ordinary course of judicial proceedings,— "Not conclusions, opinions or hearsay." The averment that the "defendant cannot with due diligence be found within the state," was therefore treated as the mere expression of an opinion on the part of the deponent. The affidavit, it was held, should have detailed all that had been done by the deponent in endeavoring to obtain personal service upon the defendant, and should be sufficiently strong to raise at least a *prima facie* case that the defendant was out of the state when the suit was commenced.[4]

§ 1043. **Expression of Opinion Not Sufficient.**— In Harrington *v.* Loomis,[5] the court, following the above construction of the statute, applied it to a case where the affidavit averred that deponent had "seen and read a letter received

[1] Sueterlee *v.* Sir, 25 Wis., 357.
[2] Mackubin *v.* Smith, 5 Minn., 367.
[3] Byrne *v.* Roberts, 31 Ia., 319; Dronillard *v.* Whistler, 29 Ind., 552.
[4] Mackubin *v.* Smith, 5 Minn., 367.
[5] 10 Minn., 366.

by mail, by * * * deponent's law partner, within a few days past, having the postmark of the postoffice at Mount Hilicon, Franklin county, Missouri, and dated at that place by the defendant; that this deponent's law partner is the agent of both said defendants, and said letter, last mentioned as so received, was directed to him and concerned the said Harrington's business in this county, and this deponent verily believes that said defendant wrote the same, and that he is now at Mount Hilicon aforesaid." This affidavit was held insufficient, as its statements were not inconsistent with defendant's residence in the state, though they expressed an opinion to the contrary.

§ 1044. Information and Belief.— Elsewhere, it has been held that for the purpose of obtaining an order of publication, an affidavit founded on information and belief will be sufficient without stating in detail the sources of such information or the grounds of such belief.[1]

§ 1045. Sufficient Statement of Absence from State.— Where the affidavit stated that the defendant was a resident of the *Southern Confederacy*, and that it was consequently impossible to obtain personal service, this was held sufficient to authorize an order of publication of notice of foreclosure of a mortgage.[2] And the mere statement of defendant's residence in the Southern Confederacy was held sufficient to show that he could not be found within the state of New York.[3]

§ 1046. Affidavit Attached to Other Papers.— Where the affidavit for an order of publication is appended to another paper which is properly entitled in the case, and the affidavit refers to such paper, it will be presumed that it has by the reference adopted the title, and the objection that the affidavit is not entitled in the cause will not be entertained.[4]

[1] Steinle *v.* Bell, 12 Abb. Pr. (N. S.), 171.
[2] Deitrich *v.* Lang, 11 Kan., 636.
[3] Van Wyck *v.* Hardy, 4 Abb. App. Dec., 496.
[4] King *v.* Harrington, 14 Mich., 532.

§ 1047. When Sufficiency of Affidavit Presumed.—Notwithstanding the strictness with which the statute has uniformly been construed, as against those claiming under judgments or decrees rendered by default after notice by publication, in a case where the term of six years had elapsed after the rendition of the judgment, and it did not appear affirmatively to the contrary, it was *presumed* that the order of publication was made on a sufficient affidavit.[1]

§ 1048. Not Impeachable in Collateral Proceeding.—Where there is a judgment by default, execution and sale of real estate, pursuant to a published notice, a subsequent grantee of the debtor in the execution cannot, in a collateral proceeding, show the falsity of the affidavit upon which the order of publication was founded, in order to impeach the validity of the judgment, execution and sheriff's deed.[2]

§ 1049. Averments in Pleading Same as in Affidavit. When by the terms of the statute no affidavit is necessary, as where the order is based upon a return of the officer in whose hands process has been placed for personal service, or when the petition or complaint sets forth the facts which render the publication of notice necessary, substantially the same averments, and the same mode of stating them, is required, as when they are set forth in the original affidavit.

§ 1050. Amendment Not Allowed After Publication.—When, after service by publication is made, the defendant does not appear to the action, the plaintiff will not be permitted to amend his pleading and take judgment by default upon the cause of action set out in the amended pleading. The defendant has no notice of the amendments, and is only called upon to answer the demand set up against him by the petition on file when the notice was published.[3]

§ 1051. Order of Publication and Notice.—In the next place *the order of publication* presents itself for consideration. *By whom should it be made?* and *What should it*

[1] Gemmell *v.* Rice, 13 Minn., 400.
[2] Ogden *v.* Walters, 12 Kan., 282.
[3] Janney *v.* Spedden, 38 Mo., 395.

contain? In answering the latter of these inquiries, we shall be compelled to enter into a description of the *notice* itself, as the order generally includes the notice, and both are published together. So, to avoid unnecessary repetition, they will be treated of without attempting to distinguish between them in detail. In ordering the publication it seems almost indispensable to state what the notice shall contain, and the notice recites the order for the purpose of showing the authority for the publication.

§ 1052. Who to Make the Order.— As to who shall make the order, this depends upon the statute by which it is authorized, the nature of the proceeding, and other minor circumstances too numerous and diverse to mention in detail, as the usefulness of the information, which, in view of frequent changes in the statute law, could only be relied upon temporarily, would not counterbalance the space consumed. In general, however, the order is made by the court where the suit is pending or by the judge or clerk in vacation.[1]

§ 1053. Must be by Designated Officer.— Where the court or officer by whom the order shall be made is designated by statute, a valid judgment cannot be rendered by default, upon a publication pursuant to the order of any one else.[2] Thus, in Bardsley *v.* Hines,[3] the record relied upon as showing title in defendant under a decree of foreclosure, contained the original notice which was served by publication, by which it appeared that the order was made by the clerk of the court, whereas the statute required an order of publication by the court or judge of the county or district court. It was held that the publication under the order of the clerk amounted to no more than if the notice had been published without any order at all, and the decree rendered by default was utterly void.

§ 1054. Change of Order Without Authority.— So where, under the Probate Act of California, it was neces-

[1] See Local Statutes.

[2] Townsend *v.* Tallant, 33 Cal., 45.

[3] 33 Ia., 157.

sary to publish an order of the court, giving public notice to all persons interested in the estate of decedent, to appear and show cause, etc., and the court made the order, designating the paper, but before the expiration of the time for which the notice was required to be published by the provision of the statute, and the order made in pursuance thereof, the paper was discontinued, and the administrator selected another paper in which the order was published, such publication was decided to be unauthorized, and the proceedings in pursuance thereof void.[1]

§ 1055. Contents of the Order.— As matter of preamble the published order usually contains a recital of such jurisdictional matters as are averred in the affidavit or petition, as a foundation for the order.[2] Nor can this be said to be unnecessary, as it is essential that the publication should set forth in substance all that is alleged against the party to be affected; though the form in which such facts are expressed is immaterial.

§ 1056. Sufficient Recitals to Inform Defendant.— The notice should contain sufficient recitals to inform defendant of the nature of the suit to which he is required to answer. To this end, the order of publication and notice should go to the extent of a substantial statement of all the objects of the suit; and where it was stated in a published notice that the object of the suit was to set aside a deed, without any statement of the grounds upon which such a decree was prayed, the notice was held insufficient, and a judgment rendered in pursuance thereof utterly void.[3]

§ 1057. Averment of Attachment in Notice.— So, where the suit is by attachment, it is held in some of the states that the notice as published should state that the defendant's property *has been attached*.[4] Where such is the

[1] Townsend *v.* Tallant, 33 Cal., 45. See, also, Adriance *v.* McCafferty, 2 Rob. (N. Y.), 153; Pomeroy *v.* Betts, 31 Mo., 419.

[2] Newman *v.* Cincinnati, 18 Ohio, 331.

[3] Bobb *v.* Woodward, 42 Mo., 482.

[4] Durossett *v.* Hale, 38 Mo., 346. See, however, Dronillard *v.* Whistler, 29 Ind., 552, where the notice is not required to show that the proceedings

construction given to the statute by the courts of the state, it has nevertheless been held sufficient to allege that the property was *about to be attached*, as the object of the notice was to advise the defendant of the *pendency of the suit*, and the plaintiff was entitled to the order on bringing the suit, which might be before the clerk issuing the order in vacation would be able to certify to the levy of the attachment.[1]

§ 1058. Nature and Amount of Plaintiff's Demand.— Under a statute requiring the published notice to state the "nature and amount of the plaintiff's demand," the notice in a suit by attachment alleged that the proceedings were "founded on two promissory notes for the sum of $386.94." A default was taken for the sum of $516. In deciding a motion to set aside the judgment for irregularity, this was held sufficiently descriptive of the *nature* of the demand, but as it nowhere appeared how much was still due on the notes, the notice was insufficient for the want of a statement of the *amount* claimed, and the judgment was set aside.[2]

§ 1059. Foreclosure and Partition — Description.— Where the object of the suit is the foreclosure of a mortgage, or the partition of real estate, the property to be affected should be correctly described, and with sufficient certainty to leave no room for doubt as to the particular parcel or parcels intended.[3]

§ 1060. Names of Defendants.— The order, and the notice in pursuance thereof, should be in harmony, and where there are several defendants, one or more of whom are, from non-residence or other cause, liable to be summoned by publication, both the order and the published notice

are by attachment. See, also, Cooper *v.* Reynolds, 10 Wall., 308; Pennoyer *v.* Neff, 95 U. S., 714; Voorhees *v.* Bank of U. S., 10 Pet., 449; Paine *v.* Moorland, 15 Ohio, 435; 1 Wade on Attachment, § 45.

[1] Harris *v.* Grodner, 42 Mo., 159.

[2] Haywood *v.* Russell, 44 Mo., 252. See, also, Gary *v.* May, 16 Ohio, 36; Lawler *v.* Whette, 1 Handy, 29.

[3] Pomeroy *v.* Betts, 31 Mo., 419.

should contain the names of those to be so served. Accordingly, in Pomeroy *v.* Betts,[1] where there were several non-resident defendants, and several others as to whom it appeared by the sheriff's return that they could not be found, etc., and an order of publication was made as to the non-residents, and service in the same manner was ordered upon those not found, under a separate provision of the statute authorizing an order of publication founded upon such return, by the *court* and not by the *clerk*, it was held that, although the names of all the absentees appeared in the notice, it being published under the order against the *non-residents*, could not be regarded as directed to those not mentioned in the first order, which was by the clerk. The order founded upon the *non est* return should have been published separately, or both should have been signed by the court. As it was, the judgment being against all, was, for the irregularity, set aside, even as to the defendant personally served.

§ **1061. Unnecessary to Designate Statute.**— It is not necessary for either the order or notice to designate the statute by which the same is authorized, and when there is an attempt to incorporate this or any other useless matter in the notice, the validity of the proceeding will not be affected by errors in setting them out or designating them.[2]

§ **1062. Order Must be Properly Signed.**— But as the making of the order is an official act, publication of the notice can give no validity to proceedings had in pursuance thereof, unless the order is signed by the court, judge or clerk designated by law as the proper one to make the same.[3]

§ **1063. Should State Return Day.**— The notice should also name the day, with reasonable certainty, upon which the defendant so served with process is required to appear and answer, and the order should direct the time for which

[1] 31 Mo., 419.
[2] Soule *v.* Chase, 1 Rob. (N. Y.), 222.
[3] Hays *v.* Lewis, 21 Wis., 663.

the publication is to be made. It was accordingly held, where a subpœna in chancery, served by publication, was dated "March 2, 1860," requiring appearance on the second Monday of "March next," that this would not authorize a decree *pro confesso*.[1]

§ **1064. Publication.**— In the next place, in pursuing the requirements of the statute and following the directions of the order, the important matter is the publication of the notice. A consideration of this necessarily involves an inquiry into the proper *medium* to be employed in making public the facts contained in the notice, and the *time* of publication, with reference both to the number of months, weeks or days for which such publication shall continue, and the particular time when it shall cease.

§ **1065. Newspaper.**— The medium of publication generally designated by the statute is a *newspaper*. Sometimes it is required to be a *public* newspaper; but this adds nothing to what would be necessarily implied in the term "newspaper;" for any publication answering this general description must of necessity be public in its character. So that proof of publication in a *newspaper* would show a sufficient compliance with a statute or order requiring the notice to be published in a *public newspaper*.[2]

§ **1066. What is a Newspaper?** — In order to fulfill the terms of the law, the notice must be directed, by the court or officer, to be inserted, for the statutory time, in some paper printed and circulated *for the dissemination of news;* but it is not essential that, to answer the description, the paper shall be devoted to the dissemination of news of a general character. It may, with equal propriety, be published in a paper devoted exclusively to the discussion of religious, legal, commercial or scientific topics, and the dif-

[1] Elee *v.* Wait, 28 Ill., 70.

[2] Bailey *v.* Myrick, 50 Me., 171. In Mobley *v.* Leophart, 47 Ala., 257, it was held that, as the chancellor and register were clothed with discretion as to the place of publication, a decree *pro confesso* in Alabama, on a publication in Georgia, was good.

fusion of knowledge touching special matters within its limited sphere, as in a public journal, the columns of which are open to news of a general character. It may be a *religious* newspaper, a *commercial* newspaper, a *legal* newspaper, a *scientific* newspaper, or a *political* newspaper.[1]

§ **1067. Published in Designated Paper.**— When the newspaper has been designated there must be a strict compliance with the order in this respect. The publication being made in any other paper than the one mentioned in the order, would confer no jurisdiction upon the court to render judgment, where there is no appearance by the defendant. But a slight variance in the title of the paper in which the notice is directed to be published, from that by which it is really known, will not vitiate the process, where it satisfactorily appears that the publication was in the one intended by the order. As where the order designated the "Evening Day Book," and the notice was published in the "New York Day Book," there being no evidence offered that there was any other paper of the same or a similar name, to which the order could apply, this was held sufficient.[2]

§ **1068. Substitute for Publication in Paper.**— Other means are sometimes prescribed by statute, either as a substitute for publication in a newspaper, or in conjunction with such publication, such as *posting* the notice in several public places within the county, but this method of publishing notices is so rarely employed for the purpose of obtaining service of process that it will not receive further notice here.

§ **1069. Full Time.**— It is of the utmost importance that the notice shall be published for the *full time* required by the statute and directed by the order of the court or

[1] Kellogg *v.* Corrico, 47 Mo., 157; Kerr *v.* Hitt, 75 Ill., 51. But in the absence of contrary provisions in the statute, it will be understood to mean a newspaper published in the English language. Cincinnati *v.* Bickett, 26 Ohio St., 49; Graham *v.* King, 50 Mo., 22; 11 Am. R., 401.

[2] Soule *v.* Chase, 1 Rob. (N. Y.), 222.

officer;[1] that the last insertion shall be a sufficient length of time before the return day;[2] and that such publication shall not commence prior to the date of the order; for until the order is made the publication is unauthorized.

§ **1070. Computation of Time.**— In computing the time of publication and the statutory period intervening between the last publication and the return day, the date of the first insertion will be included, for the purpose of determining whether the notice has been published for the full time, and the intervening period will be understood to commence with the day following that on which the time of publication ceases.[3]

§ **1071. Three Calendar Months.**— An example of this is furnished by the case of Savings, etc., Society *v.* Thompson.[4] There the first weekly insertion was made on the *10th day of January* and the last on the *9th day of April* following. This was held to be a publication for three full calendar months; and the first day of the forty required to intervene between the publication and the return would be the *10th day of April.*

§ **1072. Three Weeks Successively.**— Where the statute required publication for "three weeks successively," before the hearing, its provisions were held sufficiently complied with by three weekly publications, although the last of the three was on the day before that appointed for the hearing.[5]

§ **1073. Last Insertion Four Weeks Prior to Term.**— So, in the case of Haywood *v.* Russell,[6] under a statute requiring the publication of the notice for four weeks, and that the last *insertion* should be "at least four weeks before the term," it was held that this did not necessarily give eight weeks from the first insertion to the commencement

[1] Hill *v.* Faison, 27 Tex., 428.
[2] Grewell *v.* Henderson, 5 Cal., 465.
[3] Mitchell *v.* Woodson, 37 Miss., 567.
[4] 32 Cal., 347.
[5] Sweet *v.* Sprague, 55 Me.. 190.
[6] 44 Mo., 252. See, also, Bennett *v.* Hetherington, 41 Ia., 142.

of the term. It was the last *insertion*, not the last week of the publication, which was required to be four weeks prior to the term. The notice being inserted at the beginning of the last of the four weeks for which it was required to be published, the remaining portion of the week might go to make up a part of the time necessary to intervene between the publication and the commencement of the time at which the process was returnable.

§ **1074. Six Weeks' Publication.**—Where the statute required six weeks' publication of notice of an application to sell lands of a decedent, notice for any shorter time was held insufficient to warrant the sale, although the application was only made after the expiration of six weeks from the date of the first insertion of the notice.[1]

§ **1075. When Time Cannot be Shortened.**—So where the publication by the surrogate of a notice "to all persons interested," etc., to appear and show cause why a sale of decedent's land should not be made, was required by statute, such publication was held necessary to confer jurisdiction on the surrogate to make the order of sale, and if without the statutory notice, the sale would be void.[2] And the time prescribed by the statute was held mandatory upon the surrogate, and could not be shortened by him without rendering the order and sale utterly void.[3] Nor can the time of hearing an application for an order of sale be set for a term of court subsequent to that for which notice was originally given, without *further notice;*[4] but where process has been duly published and made returnable to the first term of court, in an action for which publication is authorized, it may be regularly continued and judgment taken at a subsequent term.[5]

[1] Gibson *v.* Roll, 30 Ill., 172; Herdman *v.* Short, 18 Ill., 59.
[2] Corwin *v.* Merritt, 3 Barb., 341.
[3] Havens *v.* Sherman, 42 Barb., 636.
[4] Morris *v.* Hogle, 37 Ill., 150: Schnell *v.* Chicago, 38 Ill., 382.
[5] Crabb *v.* Atwood, 10 Ind., 331.

§ 1076. Days, Weeks or Months.— The time for which notice shall be given is expressed either in days, weeks or months, and in construing the meaning of these terms with reference to notices of judicial and other involuntary sales of real estate, conclusions have been reached by the courts which will in general be equally applicable to notices by publication of judicial proceedings.[1]

§ 1077. Certain Time, or Certain Number of Times.— A distinction, however, is made between statutes requiring publication for a *certain period of time*, in what manner soever such period is denominated, and those requiring the insertion of the notice *a certain number of times*, in a newspaper, where the continuance of the publication will be determined by the number of regular issues within a given time.[2]

§ 1078. Ten Publications in Ten Weeks.— This distinction is fairly illustrated in Soule *v.* Chase,[3] where the notice published was of an order of the court, for the creditors of an insolvent debtor to appear and show cause why the insolvent should not be discharged from his debts. There the statute under which the publication was made, required the notice to be by *ten publications, each of which should be in one of ten successive weeks*, the commencement whereof was to be determined by the first publication. The objection of insufficient time of publication was held properly overruled, although it appeared that the proof was made on the *sixty-third day* after the first publication, the notice having been inserted once in each of ten successive weeks.

§ 1079. Two Weeks in Daily Paper.— It being questioned whether the statutory requirement, that notice should be published "for two weeks successively," could be satisfied by publication for two weeks in a daily paper, without a daily insertion, it was regarded as sufficient to insert the notice on Tuesday and Saturday of each week.[4]

[1] See *post*, § 1100 *et seq.*; § 1113 *et seq.*

[2] Sheldon *v.* Wright, 5 N. Y., 497; S. C., 7 Barb., 39.

[3] 1 Rob. (N. Y.), 222.

[4] Brewer *v.* Springfield, 97 Mass., 152.

§ 1080. **Proof of Publication.**—Next, as to the *proof of publication*. A compliance with the prerequisites of the statute with respect to publication is usually established by the affidavit of the printer or publisher of the paper in which the notice is published. This, however, is a matter of statutory regulation, and in general is not prescribed to the exclusion of all other modes of proof. Where the affidavit was held admissible, it was also held that the publication might be proved by the production of the papers containing the notice in court.[1] Nor is it necessary, in every instance where an affidavit is relied on, that it should be made by the *publisher* or *his foreman*, although, in general, one of these would be the most likely to be cognizant of the facts.[2]

§ 1081. **To Satisfaction of Court.**—In any event, it is necessary that the publication must be proved, to the satisfaction of the court, to have been in compliance with the provisions of the statute authorizing the service of process in that manner. Accordingly where the notice was not dated, and an affidavit was made and filed, declaring that a notice which was annexed had been published for six successive weeks "preceding the said 23d day of September," there being nothing in the affidavit or papers referring to, or identifying any month of September, it was held that the proof was not of publication in conformity to the statute, as it did not show *when* the notice was published.[3]

§ 1082. **Affidavit Not Conclusive.**—Where the mode of proof is by affidavit, this will not generally be regarded as conclusive upon the defendant appearing specially for the purpose of objecting to the proceeding, on account of an alleged irregularity in the service of process.[4]

§ 1083. **Divorce and Alimony.**—One of the class of actions wherein the process may be effectually served by pub-

[1] Claybrook *v.* Wade, 7 Coldw. (Tenn.), 555.
[2] Soule *v.* Chase, 1 Rob. (N. Y.), 222.
[3] King *v.* Harrington, 14 Mich., 532.
[4] Mussina *v.* Moore, 13 Tex., 7; Kitchen *v.* Crawford, id., 516.

lication which concerns other than mere proprietory rights, is a suit for divorce and alimony. In order to render this method of service effectual, however, for the purpose of binding specific property, it should include a general description of the property sought to be affected. And where there is a prayer for alimony in the petition, it cannot be granted upon the default of defendant, so as to render it available as a personal judgment, unless there is personal service.[1]

§ 1084. Judgment Binds Property.—The effect of a judgment rendered by default, or *pro confesso*, upon service of process by publication, except in proceedings for divorce, is only to bind the property of the defendant which is within the jurisdiction of the court, and against which, or with reference to which, the suit is instituted. Consequently a judgment *in personam* rendered upon such process is void.[2] As a further consequence of the limitation upon the jurisdiction of the court to render judgment upon process served by publication, an action cannot be maintained upon a judgment so obtained in another state.[3]

§ 1085. Judgment Not Subject to Collateral Attack.—Where there has been a defective service of process by publication, and a judgment or decree is entered in pursuance thereof, the proper manner of taking advantage of the irregularity is by direct proceeding to set aside such judgment or decree, as it has been laid down as a rule that the judgments of a court of general jurisdiction are not open to collateral attack, when the record upon its face shows them to be regular.[4] It is not enough that the record fails

[1] Beard *v.* Beard, 21 Ind., 321.

[2] Cooper *v.* Smith, 25 Ia., 269; Mitchell *v.* Gray, 18 Ind., 123; Judah *v.* Stephenson, 10 Ia., 493; Pomeroy *v.* Betts, 31 Mo., 419. But see Otis *v.* Dargan, 53 Ala., 178, where it was held that the heirs of a decedent were concluded by published notice of final settlement.

[3] Chamberlain *v.* Faris, 1 Mo., 517; Sallee *v.* Hays, 3 Mo., 116; Winston *v.* Taylor, 28 Mo., 82.

[4] Galpin *v.* Page, 1 Sawyer, 309; Hahn *v.* Kelly, 34 Cal., 391; Grignon's Lessees *v.* Astor, 2 How. (U. S.), 319; Voorhees *v.* Bank of U. S.,

to show jurisdiction, affirmatively. It must appear affirmatively that the court did not have jurisdiction; otherwise it will be presumed.[1]

10 Pet., 449; Sargeant *v.* State Bank of Indiana, 12 How., 371; Huff *v.* Hutchinson, 14 How., 586; Huntington *v.* Charlotte, 15 Vt., 46; Foote *v.* Stevens, 17 Wend., 483; Granger *v.* Clark, 22 Me., 128.

[1] *Ante*, § 1057. But when the court is exercising a special statutory jurisdiction, it is governed by the rule that applies to courts of limited or special jurisdiction. 1 Wade on Attachment, §§ 46, 47.

II. Judicial Sales.

§ 1086. Statutory Requirement, Directory.
1087. Purchaser with Notice.
1088. Description of Property.
1089. Immaterial Omissions.
1090. Changing Name of Paper.
1091. Several Executions in One Advertisement.
1092. Sale May be Adjourned.
1093. May be on *Alias* Execution.
1094. Error in Sheriff's Return.
1095. Publication in Paper Where Posting Required.
1096. Failure of Notice Will Not Avoid Sale.
1097. Strict Compliance Required.
1098. Sale Void for Want of Proper Notice.
1099. No Uniform Rule as to Notice of Sales.
1100. Time of Publication.
1101. Six Weeks' Notice.
1102. Once a Week for Three Months.
1103. What Constitutes Publication.
1104. Posting in Public Places.

§ 1086. Statutory Requirement, Directory.— In general, a strict adherence to statutory requirements is not so essential to a valid sale, under a judgment or decree of a court, as it is to the support of a title acquired under an involuntary sale made without such judgment or decree. The grounds of the distinction are the notoriety of the proceedings in court by which the judgment was obtained, and the fact of defendant's having already been brought in by process, and consequently is supposed to watch all subsequent proceedings likely to affect his interest, until the property levied upon to satisfy the judgment has been disposed of. It has accordingly been held that the provision of the statute requiring the advertisement of judicial sales was directory, and that a purchaser at such a sale, made without the publication of the notice directed by the statute, who purchased without any knowledge of the omission of duty by the officer, would take a good title, and any one

injured by the official misprision would be remanded to his remedy against the delinquent officer.[1]

§ **1087. Purchaser with Notice.**— But where the purchaser takes with knowledge of the failure to comply with the requirements of the statute in this particular, it is held differently.[2]

§ **1088. Description of Property.**— When the property is advertised for sale, especially if it be real estate, the published notice should contain a substantially correct description of the property, as the title of the judgment debtor to the property described in the advertisement is all the interest that will pass by the sale. So, where the description was in such general terms as, *all the land of the defendant, located in a particular county*, this was held insufficient notice of sale to pass the judgment debtor's title in the land sold, to even an innocent purchaser.[3]

§ **1089. Immaterial Omissions.**— But immaterial variations or omissions in the description of the property would not only not operate to defeat the title of the purchaser at the sale, but would not furnish grounds for an action against the officer committing the error. Thus in Duncan *v.* Matney,[4] where the sheriff, in the advertisement, omitted to mention the name of the county in which the property was located. As it is generally known that the sheriff of one county cannot sell land lying in another, this error was treated as immaterial.

§ **1090. Changing Name of Paper.**— Merely changing the name of the paper in which property is advertised for sale under an execution issued on a judgment or decree, will not have the effect of invalidating a sale made in pursuance of such advertisement.[5]

[1] Miner *v.* Natchez, 4 S. & M., 602; Hendrick *v.* Davis, 27 Ga., 167; Johnson *v.* Reese, 28 Ga., 353; Harvey *v.* Fisk, 9 Cal., 93.

[2] Hayden *v.* Dunlap, 3 Bibb, 216; Webber *v.* Cox, 6 Monr., 110.

[3] Frazier *v.* Steenrod, 7 Ia., 339; Merwin *v.* Smith, 2 N. J. Eq., 182; Reynolds *v.* Wilson, 15 Ill., 394.

[4] 29 Mo., 368.

[5] Isaacs *v.* Shattuck, 12 Vt., 668.

§ 1091. Several Executions in One Advertisement.— It is not necessary that there should be a separate advertisement for each execution, where there are several in the hands of the officer at the same time against the same defendant.[1]

§ 1092. Sale May be Adjourned.— It has been held that, to render the sale valid, it was not requisite that it should be made on the precise day for which it was advertised, if, for good reason, it should be found necessary to adjourn the sale to a subsequent day. As where, upon the property being stricken off, the purchaser was allowed until another day to perfect his arrangements for payment, and verbal notice was given that the sale would be kept open until that time; but the successful bidder failing to complete his purchase within the allotted time, the officer proceeded to sell the property without further publication of notice. The title acquired under this sale was held valid, because it did not appear that the property was sold for an inadequate price in consequence of a failure to re-advertise.[2]

§ 1093. May be on Alias Execution.— Where an advertisement had been published, and before the day of sale, as therein specified, the original *venditioni exponas* was returned and an *alias* issued, which was in the hands of the officer at the time of the sale, such sale was held valid, though the original writ under which the publication was made had expired, and there was no publication of notice after the *alias* was issued.[3]

§ 1094. Error in Sheriff's Return.— Where the sheriff, in making his return, committed an error in the description of the real estate, with reference to the numbers, and such error was continued in the advertisement, this was held not to invalidate the sale, so as to affect the title in the hands of an innocent purchaser, as against a subsequent purchaser

[1] Arnold *v.* Dinsmore, 3 Cold., 235.
[2] Isbell *v.* Kenyon, 33 Mich., 63.
[3] Luther *v.* McMichael, 6 Humph., 298.

of the same property by a correct description, who took with knowledge of the first purchase.[1] This was so decided where a suit in chancery was brought by the first purchaser to cancel the second deed, although it had previously been decided by the same court that to constitute a valid deed, under an execution sale, there must be an *advertisement* of the sale.[2]

§ 1095. Publication in Paper Where Posting Required.— So, where the statute provided for the publication of notice of sale, by posting written or printed copies in public places within the county, and the officer omitted entirely to give the notice in the prescribed manner, but published it in a newspaper, it was held that this irregularity would not vitiate a sale of either real or personal property, made in pursuance of notice so published.[3]

§ 1096. Failure of Notice Will Not Avoid Sale.— There are other cases decided under statutes requiring the publication of notice of judicial sales, either by advertisement in a newspaper for a specified time, or by a certain number of insertions, or by posting copies of the notice in public places, where it is held that this requirement of the statute is merely directory, and a failure or omission to publish the notice will merely have the effect to render the delinquent officer liable to any one injured by his misprision, and will not affect the title of a purchaser at the sale.[4]

§ 1097. Strict Compliance Required.— Upon the other hand, the cases decided under similar statutes are quite numerous, where a strict compliance with the statutory pro-

[1] Steward *v.* Pettigrew, 28 Ark., 372. See, also, Newton *v.* State Bank, 14 Ark., 9; Ringold *v.* Patterson, 15 id., 209; Newton's Heirs *v.* State Bank, 22 id., 19.

[2] Hughes *v.* Watt, 26 Ark., 328.

[3] Miner *v.* Natchez, 4 Sm. & Marsh., 602.

[4] Hudgens *v.* Jackson, 51 Ala., 514; Smith *v.* Randall, 6 Cal., 47; *ante*, § 1086, note. See Reynolds *v.* Harris, 14 Cal., 667, where it was held that a purchaser would only be protected where he had paid the purchase money before notice.

visions in respect to notice of sale is required, in order to divest the title of the judgment debtor.[1]

§ 1098. Sale Void for Want of Proper Notice.— In Mitchell *v.* Lipe,[2] the sale was held void under the statute for the want of the notice prescribed, even where the judgment debtor had requested the sheriff to make the levy, it being held that such request did not amount to a waiver of notice. And in Underwood *v.* Jeans,[3] the publication actually made was acknowledged to be even more ample than the law required; but the statutory manner of giving notice being by posting one copy in each hundred of the county ten days prior to the day of sale, a failure to prove the posting of a copy of such notice in one of the hundreds *for the full time* was held fatal to the validity of the sale.

§ 1099. No Uniform Rule as to Notice of Sales.— The statutes of the several states, governing judicial sales, though similar, differ sufficiently to admit of different construction by the courts. They are also more or less modified or affected by other statutes, which facts render it exceedingly difficult to deduce, from the authorities examined, anything like a rule as to the effect of an entire want of notice, or of insufficient notice of a sale made under judgment or decree of court.

§ 1100. Time of Publication.— Nevertheless, there are certain questions affecting the giving of notice of sale by publication, which are likely to arise in any case where it becomes necessary to give judicial construction to the language of a statute. The time for which the notice is published is one of the most important of these, for, although

[1] Trot *v.* McGavock, 1 Yerg. (Tenn.), 469; Loyd *v.* Anglin, 7 id., 428; Mitchell *v.* Lipe, 8 Yerg., 179; Underwood *v.* Jeans, 4 Harr. (Del.), 201; Burton *v.* Wolfe, id., 221; Gernon *v.* Bestick, 15 La. An., 697; Russell *v.* Dyer, 40 N. H., 173. See Blair *v.* Compton, 33 Mich., 414, where it is laid down that a sale was void as to the excess in number of shares of stock sold *en masse*, over what was stated to be the number at the time, though a larger number had been advertised.

[2] *Supra*, § 1097.

[3] *Supra*, § 1097.

defects in this particular will not, in every instance, prove fatal to the title after payment of the purchase money and delivery of the deed, it may be raised at a time when it will serve to obstruct the perfecting of the purchaser's title, by furnishing grounds for an objection to the approval of the sale.

§ **1101. Six Weeks' Notice.**— Where the statute required *six weeks' notice* to be given, and under this provision designated the *manner* of giving such notice to be by fastening up the same *for six successive weeks*, and by publication in a newspaper *once a week for six successive weeks*, the law was held to be sufficiently complied with by posting the notice as required, and by publication once in each week of the six, although the full term did not elapse between the first publication and the day of the sale.[1]

§ **1102. Once a Week for Three Months.**— So, where a statute requires the notice to be published *once a week for three months*, or *for three successive weeks*, the law is satisfied by an insertion in the paper once in each *week*, as time is divided, regardless of the fact that a period longer or shorter than seven days intervenes between successive issues of the paper.[2]

§ **1103. What Constitutes Publication.**— In Pratt *v.* Tinkcom,[3] where the statute required six weeks' notice of a sale, it was held that the first publication, being on the 1st day of February, would not authorize a sale on the 10th day of March, and that the defect could not be cured by adjourning the sale and continuing the notice to the 17th. It was also decided, in the same case, that papers sent to the postoffice, some for transmission through the mails, and others for local delivery, are *published* when deposited in

[1] Olcott *v.* Robinson, 21 N. Y., 150, reversing the judgment of general term, reported 20 Barb., 143. See Nalle *v.* Fenwick, 4 Rand., 585; Elliott *v.* Eddins, 24 Ala., 509.

[2] Rockendorff *v.* Taylor's Lessee, 4 Pet., 349; Bachelor *v.* Bachelor, 1 Mass., 256; Pearson *v.* Bradley, 48 Ill., 250; Cass *v.* Bellows, 31 N. H., 501.

[3] 21 Minn., 142.

the postoffice, regardless of the dates borne by the papers. Consequently, where *five-sixths* of the edition, dated the *25th*, were issued on the *24th*, the publication would not be considered as of the date when but *one-sixth* of the papers were issued.

§ **1104. Posting in Public Places.**— In Sowards *v.* Pritchett,[1] the important matter of inquiry was as to what was a sufficient compliance with a statute requiring notice of the sale to be posted at *five public places* in the neighborhood. Two copies of the notice were posted at school-houses, but it did not appear that they were occupied at the time. The others were posted near three different roads, but one of which was mentioned as a *public road*, leaving the inference that the other two were private thoroughfares. Six persons living in the vicinity of the land sold had never seen any of the notices, none of which were posted about the court-house, nor was publication made in the county newspaper. But few persons attended the sale, and the property brought about two-thirds of its value. Under these circumstances, the notice was held insufficient, although, in the same case, it was decided that mere shortness of the time of publication, where no period was fixed by the decree, when taken alone, would not warrant setting aside the sale, but might be considered in connection with the other irregularities and the inadequacy of the price for which the land was sold.[2]

[1] 37 Ill., 517.

[2] See §§ 1128, 1129, 1130, for sales made by orders of probate court under certain circumstances.

III. Non-judicial Involuntary Sales.

§ 1105. Strict Compliance with Statute Required.
1106. Tax Sales.
1107. Publication an Official Act.
1108. When State Printer Designated.
1109. Should State the Amount Due.
1110. Should Give Name of Tax Debtor.
1111. Time Fixed by Statute to be Closely Followed.
1112. Sale Held Void After Fifty Years.
1113. Construction as to Time.
1114. Three Successive Publications for Three Months.
1115. During Three Successive Weeks.
1116. Should Commence After Tax Becomes Due.
1117. Form and Sufficiency.
1118. When Form Prescribed by Statute.
1119. Proof of Publication.
1120. Statutory Mode of Proof Exclusive.
1121. Required Certificate Must be Certain in Statement.

§ 1105. Strict Compliance with Statute Required.— Involuntary sales, made in pursuance of a statutory power, without a judgment or decree of court, are less favorably considered, and the prerequisites to the exercise of the power are more rigidly exacted, than where there has been an attempt to give the property owner his day in court, and where he has at least had notice of the institution of proceedings which might eventuate in the sale of his property. Titles acquired under non-judicial involuntary sales are aided by no presumptions in their favor, but must depend for their validity upon a strict compliance with the statutes by which they are authorized. And no statutory requirement is regarded as of more importance than that in relation to *notice of sale*.[1]

§ 1106. Tax Sales.— The greater number of sales of this kind, which have been the subject of judicial controversy, in respect to the matter of notice, are such as are made to satisfy the demands of the state or municipality for unpaid

[1] See *post*, § 1133, Mortgagee's Sales.

taxes on real property. The manner of giving notice of such sales, both to tax debtors and to the public, is by advertisement in newspapers. Where this is the mode designated, the language of the statute is mandatory upon the officer whose duty it is to make the sale, the validity of which depends upon strict compliance.[1]

§ **1107. Publication an Official Act.**— The publication of the notice is an official act, and the advertisement must therefore be signed by the officer designated by statute to give the notice. It is not enough that he is the officer *elect*, who, after the insertion of the advertisement in the newspaper, is duly qualified. Such subsequent qualification will not take effect by relation, and clothe the act, performed before the officer had been thereto empowered, with an official character, and so render valid and binding a sale made in pursuance of such published notice.[2]

§ **1108. When State Printer Designated.**— Where the statute prescribed that the notice of sale should be advertised in a paper published by the state printer, but after the insertion of the notice in such official paper, and before the expiration of the time prescribed for the publication, the publisher of the paper ceased to be the state printer, such publication was held insufficient, and a sale in pursuance thereof, utterly void.[3]

§ **1109. Should State the Amount Due.**— The notice as published should contain a correct statement of the amount due,[4] the true object of the tax,[5] an accurate description of the property,[6] and the name of the tax debtor.[7]

[1] Williams *v.* Peyton, 4 Wheat., 77; Early *v.* Doe, 16 How., 610.

[2] Langdon *v.* Poor, 20 Vt., 13; Spear *v.* Ditty, 9 Vt., 282; Broughton *v.* Journeay, 51 Pa. St., 31.

[3] Bussey *v.* Leavitt, 12 Me., 378; Pope *v.* Headen, 5 Ala., 433.

[4] Eastman *v.* Little, 5 N. H., 290; 4 Hill, 92.

[5] Pierce *v.* Richardson, 37 N. H., 306; Langdon *v.* Poor, *supra.*

[6] Patrick *v.* Davis, 15 Ark., 363; Tallman *v.* White, 2 N. Y., 66.

[7] Washington *v.* Pratt, 8 Wheat., 681; Pierce *v.* Richardson, 37 N. H., 306; Alvord *v.* Collin, 20 Pick., 418; Miller *v.* Graham, 17 Ohio St., 1.

§ 1110. Should Give Name of Tax Debtor.—The strictness of the rule laid down with respect to a statement of the *name of the tax debtor*, and the *amount of the tax*, are both fairly illustrated in Eastman *v.* Little.[1] There the form of notice followed was one prescribed by the secretary of the treasury, who was authorized by statute to establish the necessary regulations for carrying the revenue laws into effect, yet for a failure to state in the advertisement the name of the tax debtor, and the amount due on each piece of land separately, the sale was declared to be void.[2]

§ 1111. Time Fixed by Statute to be Closely Followed. Howsoever arbitrarily the time for the commencement and continuation of the publication may be fixed by statute, its provisions must be closely followed in order to divest the title of the tax debtor. Accordingly, where the advertisement was changed after the expiration of a part of the prescribed period of publication, and a new day of sale fixed, even with the consent of the tax debtor, the sale was declared void.[3] Nevertheless, where a certain number of days are designated, the last publication to be so many days before the sale, the fact that the advertisement was published after this day would not affect the validity of the sale to defeat it for non-compliance with the statute. Neither would it operate to cure a failure to make the publication early enough to give it the full time prescribed by statute, between the first and the last day.

§ 1112. Sale Held Void After Fifty Years.—In Farrar *v.* Eastman,[4] decided in 1833, with reference to the validity of a sale which took place in 1780, under the provincial act of 26 Geo. II., requiring forty days' notice, the tax for which the land was sold appeared to have been voted only thirteen days before the date of the tax deed. The court, with

[1] *Supra*, § 1109.

[2] See, also, Shimmin *v.* Inman, 26 Me., 228; Sargent *v.* Bean, 7 Gray, 125.

[3] Scales *v.* Alvis, 12 Ala., 617.

[4] 10 Me., 191.

every inclination in the direction of sustaining a transaction of so many years' standing, held the sale void, as it was impossible, under the circumstances, that forty days' notice could have been given.

§ 1113. Construction as to Time.— Where the time prescribed for the publication is stated loosely as so many days, weeks or months, without specifying how long before the day of sale such publication shall be completed, it will be understood to mean a continuous publication immediately preceding the sale. As, for example, where the statute required *three months'* notice, the court construed this to mean the *three successive months next preceding the sale.* And the advertisement being published during the month of December, omitting January, but was afterwards inserted during the months of February and March, this was held insufficient to authorize a sale in April.[1]

§ 1114. Three Successive Publications for Three Months.—"Three successive publications in a newspaper, three months prior to the sale," was held to require that the last insertion should be three months prior to the day of sale.[2]

§ 1115. During Three Successive Weeks.— Where the notice was required to be published "during three successive weeks," this was held to mean *three full weeks*, or twenty-one days from the first publication.[3]

§ 1116. Should Commence After Tax Becomes Due.— A further important requisite as to time is, that the publication should commence after the tax becomes due; and when the statute requires a return to be made of a list of delinquents, and the intervention of a certain time between such return and the publication of the notice, the statutory period must have elapsed, in order to render the publication sufficient to support a title acquired under the sale.[4]

[1] Delogney *v.* Smith, 3 La., 418.
[2] Bussey *v.* Leavitt, 12 Me., 378.
[3] Francis *v.* Norris, 2 Miles, 150; Pennell *v.* Monroe, 30 Ark., 661.
[4] Rockendorff *v.* Taylor, 4 Pet., 349; Early *v.* Doe, 16 How., 610.

§ 1117. **Form and Sufficiency.**— The form of the notice of sale is generally prescribed by statute; but where there is no such statutory form, the language of the published notice should be sufficiently clear and unequivocal to convey the necessary information to both tax debtor and the public. If it is so expressed as to contain all the statements required by statute, it will be sufficiently formal, however inartificially it may be drawn.[1]

§ 1118. **When Form Prescribed by Statute.**— It has been laid down by a very able text writer, that where a certain form of notice is prescribed it must be "strictly, if not literally, followed."[2] This statement of the doctrine is questioned by Judge Cooley, who denies that the law ever requires a *literal* adhesion to forms.[3] The conclusion reached by the last mentioned author seems to be supported by much the better reason.

§ 1119. **Proof of Publication.**— The proof of publication ordinarily required is the affidavit of the printer or publisher of the newspaper containing the advertisement. If upon its face it appears insufficient, either in point of time of publication, or contents of the notice, parol proof will, in general, be held inadmissible for the purpose of supplying the deficiency or explaining the omission.[4]

§ 1120. **Statutory Mode of Proof Exclusive.**— Sales of this kind, being in the nature of forfeitures, are not favored by the courts, in the proof of compliance with the statute. As where the law required the delinquent list and the notice to be recorded for the purpose of perpetuating the evidence of the time of publication, this means of showing a compliance with the statute was held to be exclusive of all others, as against those claiming under the tax sale, who

[1] Chandler *v.* Spear, 22 Vt., 388; Hobbs *v.* Clements, 32 Me., 67.

[2] Blackwell on Tax Titles, 223.

[3] Cooley on Taxation, 337, n. 2.

[4] Finch *v.* Pinckard, 5 Ill., 69; Nelson *v.* Pierce, 6 N. H., 194; People *v.* Highway Com'rs, 14 Mich., 528; Lovejoy *v.* Lunt, 48 Me., 377; Sexton *v.* Rhames, 13 Wis., 99.

would not be permitted to prove by matters *dehors* that the notice had been published for the statutory time; although one claiming adversely to the tax title would not be so concluded.[1]

§ 1121. Required Certificate Must be Certain in Statement.— An official certificate which the law designates as the proper means of authenticating the publication of a notice, must be unequivocal and certain in its statements. As, where the county auditor was required to publish notices by posting them in certain localities, and his certificate stated that he had delivered copies of the notices to another officer, who, he believed, had posted them in the places required by law, the certificate was held fatally defective, and its omissions could not be supplied by parol evidence.[2] And where the treasurer failed to authenticate a copy of the printed advertisement, as required by law, this omission, it was held, rendered the sale void.[3]

[1] Kellogg *v.* McLaughlin, 8 Ohio, 114.
[2] Doe *v.* Sweetser, 2 Ind., 649.
[3] Flint *v.* Sawyer, 30 Me., 226; Hill *v.* Mason, 38 id., 461.

IV. Miscellaneous Proceedings.

§ 1122. General Remarks.
1123. Contract for Public Improvements.
1124. Special Assessments.
1125. Notice of Intention to Order Improvements.
1126. Notice of Opening Streets.
1127. Eminent Domain.
1128. Sales by Guardians and Curators.
1129. Executor's Sale.
1130. Sold for Paying Debts of Deceased.
1131. Executor's Notice — How Addressed.
1132. Meeting to Divide Township.
1133. Mortgagee's Sales.
1133*a*. Notice to Redeem from Tax Sale.
1134. Matters Noticed Elsewhere.

§ 1122. General Remarks.— There are proceedings by which the proprietory rights of individuals are affected, notice of which may be given by publication in a newspaper or by posting copies in certain designated localities. But in order to give such publication the effect of *actual* notice to the party whose rights are affected by the proceeding, regardless of whether he reads the advertisement or not, it is necessary that this mode of notification should be authorized by statute, and that the statute by which it is authorized, being in derogation of common law, should be strictly construed and closely pursued. When the proceeding closely resembles one of a judicial character, in the sense that there is a hearing and adjudication before a judicial tribunal, the strictness of construction seems to be somewhat relaxed for reasons heretofore stated;[1] but when the ultimate purpose of the proceeding is to divest the title of the property owner by *forfeiture*, without giving him an opportunity to be heard in defense of his rights, the strictest observance of statutory requirements is exacted, in order to render such notice effectual.

See *ante*, Part II.

§ 1123. Contract for Public Improvements.— Among the matters which may be constructively brought to the knowledge of those whose rights are to be affected, is the letting of contracts for the grading or other improvement of streets, alleys and other public thoroughfares, where the cost of such improvement is to be made a charge upon adjacent property. These charges, though a species of taxation, are not generally so denominated, but are known by the distinguishing appellation of "special assessments,"[1] and where notice prior to such assessment is required to be published, the assessment will only be valid when there has been a substantial compliance with the statute in this and every other important particular.[2]

§ 1124. Special Assessments.— The rule governing notice of involuntary sales, made without the judgment of a court, will generally be found applicable to special assessments.[3]

§ 1125. Notice of Intention to Order Improvements.— In Haskell *v.* Bartlett,[4] under a statute requiring publication of a notice of intention to order improvements upon streets, in the paper having the city and county printing, for ten days successively, excepting Sunday;[5] and where there was another statute in force requiring the city printing to be in a paper published within the city,[6] the court had occasion in construing the two statutes to define the word "published." The paper in which the notice was printed, published daily, both morning and evening editions,— the morning edition for circulation in the city, and the evening edition for the country. The notice appeared in the morning edition; but for two days of the ten this edition was not printed, and it

[1] Emery *v.* Gas Co., 28 Cal., 345; Argenti *v.* San Francisco, 16 Cal., 255; People *v.* Whyler, 41 Cal., 351. City paying for opening streets, 20 La. An., 497; Garrett *v.* St. Louis, 25 Mo., 505.

[2] 2 Dillon, Munic. Corp., § 605, and cases cited.

[3] *Ante*, part III of this chapter.

[4] 34 Cal., 281.

[5] Cal. Stats., 1862, p. 403, § 25.

[6] Cal. Stats., 1856, pp. 163–4, §§ 68–9.

did not appear that the evening edition containing the notice for these two days was circulated in the city. The publication was held insufficient, as the paper, to be *published* within the city, should have been *circulated* as well as *printed* there.

§ **1126. Notice of Opening Streets.**— Where the statute required notice of the opening of streets to be published in two papers in the city, in order to afford owners of lots an opportunity to make application for damages, there being but one paper published in the city, it was held that the insertion of the notice in that for the required time, together with *personal* notice to the owner of the lot in question, was a sufficient compliance with the statute to enable the city to recover the assessments.[1] It would probably have been held the same way had the statute requiring notice had any other object than the one declared. It is apparent that in this case there was a sufficient excuse for not pursuing the letter of the statute strictly, when it was followed in its *spirit*, as closely as possible under the circumstances.[2]

§ **1127. Eminent Domain.**— Where the state or nation, or one acting under powers delegated by proper authority, in the exercise of the right of *eminent domain* undertakes to condemn private property to public use, it must not only be done in strict subordination to the constitutional provision requiring *just compensation* to be paid to the private owner, but the power of condemnation must be exercised in conformity to the statute by which it is authorized. Proceedings for this purpose vary considerably in different states, being to a greater or less degree judicial in their character. But in all, *notice* in some form or other, to private owners, is an essential preliminary. Where the owner of the land to be taken is a non-resident of the state in which the same is situated, he is generally notified by publication. In cases of this kind the same strict construction, and close following

[1] Darlington *v.* Commonwealth, 41 Pa. St., 68.
[2] Wood *v.* Blanchard, 19 Ill., 38.

of the statute, is required, as in case of involuntary sales without judgment or decree;[1] but a failure to give notice, as required by statute, could not be taken advantage of, when all the parties in interest voluntarily appeared at the time and place for which the notice should have been given.[2]

§ **1128. Sales by Guardians and Curators.**— There are other proceedings which have for their ultimate object the sale of property by those acting in a fiduciary capacity, as guardians of infants or insane persons, and administrators or executors of estates of decedents. An order of sale is required in such cases, and is in general only granted after a hearing, of which there must be notice given by publication or otherwise. This notice, when by publication, being of a proceeding somewhat in the nature of an adjudication, is governed to a considerable extent by the rules applicable to the service of original process in the same manner. It has, nevertheless, been held that the title of a purchaser at such sale would not be affected by a failure to publish the notice of application for "license to sell," for full four weeks, as prescribed by statute.[3]

§ **1129. Executor's Sale.**— Where the statute required notice of executor's sale to be by posting copies in three public places in the county, "or by publication in a newspaper, if the judge should so order," there being no evidence of the posting of the copies as required by statute, and no order for the publication in a newspaper, proof of the publication having been made in a newspaper was held insufficient to warrant the sale.[4]

§ **1130. Sold for Paying Debts of Deceased.**— There must also be strict compliance with the statutes authorizing the sale of real estate of deceased persons, by executors or

[1] Harbeck *v.* Toledo, 11 Ohio St., 219; Darlington *v.* Commonwealth, 41 Pa. St., 68; Kidder *v.* Peoria, 29 Ill., 77; Specht *v.* Detroit, 20 Mich., 168; Baltimore *v.* Bouldin, 23 Md., 328.

[2] East Saginaw & St. Clair R. R. Co. *v.* Benham, 28 Mich., 459.

[3] Woods *v.* Monroe, 17 Mich., 238.

[4] Halleck *v.* Moss, 17 Cal., 339; Haynes *v.* Meeks, 10 id., 110.

administrators, for the purpose of paying the debts of deceased, or otherwise fulfilling the duties of administration, with respect to the *time* for which notice is required to be published, to all persons interested to appear and show cause, etc., and such time, when prescribed by statute, cannot be abbreviated by order of the court so as to authorize a sale.[1]

§ 1131. Executor's Notice — How Addressed.— Published notices cannot be addressed by executors and administrators, specifically by name to all those who are to be affected, for the reason that they are so numerous as to render such a course impracticable, even where the personal representative was cognizant of all their names. It has accordingly been held that a notice published by an executor, addressed "to the heirs-at-law, next of kin, and all other persons interested in the estate of," etc., was sufficient.[2]

§ 1132. Meeting to Divide Township.—Where notice of the time and place of meeting to divide the townships was required by statute to be published *three weeks before the time of meeting*, it was held that three publications, made within the three weeks next preceding the time of meeting, was not a compliance with the statute, as the first publication was intended to be full three weeks prior to the meeting.[3] But where "sixty days' notice" was required to be published of calls for instalments of stock in a corporation, one insertion sixty days prior to the day fixed was held sufficient.[4]

§ 1133. Mortgagee's Sales.— There are also sales made in pursuance of published notice where the publication is made according to the terms of a contract between the parties interested, as a mortgage with power of sale without judicial foreclosure or deed of trust in the nature of a mort-

[1] Townsend *v.* Tallant, 33 Cal., 45; Corwin *v.* Merrett, 3 Barb., 341; Havens *v.* Sherman, 42 Barb., 636; Gibson *v.* Roll, 30 Ill., 172.

[2] Wells *v.* Child, 12 Allen, 330.

[3] *In re* North Whitehall, 47 Pa. St., 156.

[4] Andrews *v.* O. & M. R. R. Co., 14 Ind., 169.

gage with power of sale. The time and place of sale, as well as the time for which the notice shall be published, being fully provided for in the instrument, it is only requisite that the provisions of the contract shall be complied with, in order to render the sale valid and binding.[1]

§ 1134. Matters Noticed Elsewhere.— There are other matters which may be brought to the notice of parties by publication in a newspaper, by which their rights or liabilities may be enlarged or restricted with reference to their transactions with those giving the notice; as a dissolution of partnership, regulations by common carriers, restricting their liabilities as such, and the like; but these notices, when published, must be satisfactorily brought home to the parties to be affected, by other evidence than the mere fact of publication. For this reason they are not treated here, but are noticed elsewhere.[2]

[1] Pratt *v.* Tinckom, 21 Minn., 142. See Jones on Mort., § 1827 *et seq.*; § 1821 *et seq.*

[2] See *ante*, parts I and II.

CHAPTER XII.

PRACTICE AND PLEADING.

I. Original Process.
II. Notice of Trial.
III. Notice of Motions and Other Interlocutory Proceedings
IV. Notice of Appeal.
V. Notice of Taking Depositions.
VI. Notice to Produce Books and Papers.
VII. Service.
VIII. The Return.
IX. Pleading.

I. Original Process.

§ 1135. General Nature of Modern Summons.
1136. Importance of Due Service.
1137. When Personal Notice Required.
1138. Rule Applies to All Judicial or *Quasi* Judicial Proceedings.
1139. Assessment of Damages to Property.
1140. Decree in Chancery — Summary Proceedings.
1141. Judgment Against Sureties.
1142. Divorce and Alimony.
1143. Justice of Peace.
1144. Actions *In Rem*.
1145. Annulling Certificate of Purchase.
1146. Knowledge Will Not Excuse Notice.
1147. Must be Written or Printed.
1148. Must Conform to Statute.
1149. Should State Time and Place.
1150. Where But One Cause of Action Described.
1151. *Scire Facias*.
1152. Should Contain the Name of Defendant.
1153. Omission of Name Held Immaterial.
1154. Venue.
1155. Immaterial Variations and Omissions.
1156. Requirements of Different States as to Certainty of Summons.
1157. The "Purpose" to be Stated.
1158. Infant Defendants.
1159. When Returnable.
1160. Substantial and Technical Defects.
1161. Jurisdiction.

§ 1135. General Nature of Modern Summons.— Whatever be the wording or the technical name of the instrument by which a person is advised of the pendency of a civil suit against him; whether it be mandatory in its terms to the officer charged with its service, bidding him to summon the party to *be and appear*, etc., or is couched in language merely suitable for the conveyance of information to the defendant, advising him that *unless he appear*, etc., judgment will be taken against him, it is still, in effect, a *notice*, and nothing more, though it may be styled a writ. It no longer serves the purpose of the ancient original writ further than to inform the defendant of the pendency of the action, and afford him an opportunity to appear and defend. In some of the states the original process by which the court obtains jurisdiction of the defendant is no longer styled a *writ of summons*, but is called simply a notice.[1] And where this change has been adopted, the notice is found to subserve all the purposes for which a writ will be found necessary, when it is not desired to place the defendant under personal restraint.

§ 1136. Importance of Due Service.— This process, being first in order, is also of primary importance in the institution of a suit either at law or in equity; for its due service, actually or constructively, is necessary to give the court jurisdiction either of the *defendant*, in personal actions, or of the *thing*, in actions *in rem*.[2]

§ 1137. When Personal Notice Required.— Where the object of the action is to obtain a judgment against the defendant upon which an execution may issue to be levied generally of his goods and chattels, or of his property, personal, real and mixed, it is necessary at common law that

[1] Code of Iowa (1873), § 2599, p. 441.

[2] The Globe, 2 Blatch. Ct. Ct., 427; Pagett *v.* Curtis, 15 La. An., 451; Pomeroy *v.* Betts, 31 Mo., 419; Kehler *v.* Jack. Manuf. Co., 55 Ga., 639. But where the court has found that proper notice was given, the question cannot be raised in another proceeding. Estate of Palomares, 63 Cal., 402.

there should be a personal notice, citation, summons or subpœna, or that the defendant should voluntarily appear to the action. In cases of this character, such notice or appearance is indispensable to the jurisdiction of the court.[1]

§ 1138. Rule Applies to All Judicial or Quasi Judicial Proceedings.— This is true of every proceeding of a judicial nature, to which there are two or more parties, except where there are statutory provisions authorizing process other than personal. All the parties are entitled to a hearing before judgment can be legally pronounced against them. Of this they could have no assurance, if they were not notified of the pendency of the proceedings against them. Without such notice, then, as is imparted by the original process issuing out of a court or other judicial tribunal, any judgment rendered against one or more of the parties would not only be erroneous, but, in general, *absolutely void.*[2]

§ 1139. Assessment of Damages to Property.— So, where a commissioner of highways instituted proceedings under the provisions of a statute of the state of New York, for the re-assessment of damages to the property of defendant, by reason of the necessary improvement of a public thoroughfare, it was held that the parties whose proprietory rights were affected by the proceeding were entitled to be heard, and hence were entitled to due notice of such proceeding.[3]

[1] Gray *v.* Hawes, 8 Cal., 562; Cooper *v.* Smith, 25 Iowa, 269; Wilson *v.* Johnson, 30 Tex., 499.

[2] Judah *v.* Stephenson, 10 Iowa, 493; Madden *v.* Fielding, 19 La. An., 505; Mitchell *v.* Gray, 18 Ind., 123; Klemm *v.* Dewes, 28 Ill., 317; Goudy *v.* Hall, 30 Ill., 109; Penobscot R. R. Co. *v.* Weeks, 52 Me., 456; Bruce *v.* Cloutman, 45 N. H., 37; Oswald *v.* Grey, 29 Eng. L. & Eq., 85; Peters *v.* Newkirk, 6 Cow., 103; Copeland *v.* Directors of Mining Co., 33 Mich., 2; Mitchell *v.* Runkle, 25 Tex. Supp., 132; Simpson *v.* Knight, 12 Fla., 144; Falconer *v.* Montgomery, 4 Dall., 232; Crowell *v.* Davis, 12 Met., 293; Ballitt *v.* Musgrave, 3 Carr. & Kir., 31; Craig *v.* Hawkins, Hardin (Ky.), 46; Cobb *v.* Wood, 32 Me., 455; Curtis *v.* Sacramento, 64 Cal., 102.

[3] People *v.* Tallman, 36 Barb., 222; Cox *v.* Mathews, 17 Ind., 367; The R. R. Tax Case, 8 Saw., 238. A policeman against whom charges are

§ 1140. Decree in Chancery — Summary Proceedings. So, also, has it been uniformly held that a decree in chancery could not be rendered against a party defendant who had not been cited or notified to appear.[1] And whenever a person's rights are to be affected by a summary proceeding or motion in court, he must be notified, in order that he may appear and protect his interests.[2] But there are certain circumstances where a preliminary injunction may be obtained without notice of the application.[3]

§ 1141. Judgment Against Sureties.— So where it was sought to obtain judgment against the sureties on a forthcoming bond, it was held that, in the absence of notice to such sureties, any judgment obtained against them would be an absolute nullity, for the want of jurisdiction, legally obtained, of the parties against whom the judgment was rendered.[4]

§ 1142. Divorce and Alimony.— It has also been held that, in an action for divorce, or for alimony incident to a decree of divorce, a personal judgment for such alimony could not be had against a citizen of another state without first obtaining jurisdiction of such non-resident party by the service of process upon him personally, or according to a mode recognized as the legal equivalent of such personal service, within the territorial jurisdiction of the court rendering the judgment. Constructive notice, by publication of summons, will not be sufficient, even where the decree of divorce itself may be rendered upon such substituted process.[5]

§ 1143. Justice of Peace.— Nothing need be said in support of a rule so salutary. Every variation or modifica-

preferred by any one except a commissioner is entitled to notice. McDermott *v.* Board of Police, 25 Barb., 635.

[1] Morris *v.* Bailey, 15 La. An., 2; Elee *v.* Wait, 28 Ill., 70.

[2] George *v.* Middough, 62 Mo., 549.

[3] Eureka, etc., Co. *v.* Superior Court, etc., 5 West Coast Rep., 179.

[4] Roach *v.* Barnes, 33 Mo., 319. But sureties are not always entitled to notice before judgment may be entered against them. Farmer *v.* Stewart, 2 N. H., 97.

[5] Beard *v.* Beard, 21 Ind., 321.

tion of its requirements needs justification upon the strongest grounds of necessity. Its application must be alike to all proceedings of a judicial character, whether before courts of general or limited jurisdiction. It is equally necessary to an impartial administration of justice in courts of record and in the trial of causes before justices of the peace.[1]

§ **1144. Actions in Rem.**— The necessity of personal notice to the defendant is not confined to cases where a personal judgment is sought. Where the property of defendant has been attached, except in those cases where the statute provides for notice by publication, the defendant is entitled to personal notice, not only of the pendency of the suit, but of the attachment of his property. The object of the notice is to enable him to appear and plead, as well to the affidavit of attachment as to the merits of the claim or demand, and judgment should not be given against him without satisfactory proof of such notice.[2]

§ **1145. Annulling Certificate of Purchase.**— So, in a suit under a statute of the state of California for the purpose of annulling a certificate of purchase of land sold by the state upon a credit, and the purchaser had failed to meet the deferred payments, though the object was not to obtain a personal judgment against the delinquent purchaser, still, as the statute had provided no substituted service in an action of that sort, it was held that personal process was necessary to give the defendant his day in court.[3]

§ **1146. Knowledge Will Not Excuse Notice.**— The mere fact, however, that the defendant has been personally notified of a suit brought against him, will not always be a sufficient service of process upon which to predicate a judgment. Mere cognizance of the existence of the action is

[1] Case *v.* Hannahs, 2 Kan., 490; Johnson *v.* Baker, 38 Ill., 98; Mitchell *v.* Runkle, 25 Tex. Supp., 132; People *v.* Bacon, 18 Mich., 247; Alexander *v.* Quigley's Ex'rs, 2 Duv. (Ky.), 399.

[2] Simpson *v.* Knight, 12 Fla., 144.

[3] People *v.* Herman, 45 Cal., 689.

not a notice, in the legal sense, by which a party may be subjected to the jurisdiction of a court so as to give validity to a judgment rendered against him.[1]

§ **1147. Must be Written or Printed.**— Unless the formal requisites of the original process are expressly waived by the defendant, such process is universally required to be *written or printed.* Mere verbal notification has never been held sufficient to require the appearance of the party summoned to answer either civilly or criminally.[2]

§ **1148. Must Conform to Statute.**— As to what the written or printed notice should contain, it may be stated generally, as such matters are regulated by statute, that whether the process be for actual, personal service, or for constructive service by publication, it must conform substantially to the requirements of the statute by which it is authorized.[3]

§ **1149. Should State Time and Place.**— It is universally requisite, however, that the original process should state the time and place of trial with substantial correctness, and with reasonable certainty. It was accordingly held that where judgment was rendered upon an original notice, which did not state the time and place when and where defendant was required to appear and defend it, was not binding upon such defendant, and could be successfully attacked in a collateral proceeding.[4]

§ **1150. Where But One Cause of Action Described.**— It has also been held, where a summons was issued and served upon a party requiring him to answer to fourteen different suits, upon as many promissory notes, and the process described with reasonable certainty one of such notes, and mentioned the others as "thirteen similar notes," that the process was good only as to the one note described,

[1] Peabody *v.* Phelps, 9 Cal., 213.
[2] 1 Tidd's Prac., 109 *et seq.*; Whittaker's N. Y. Prac., 93.
[3] Karr *v.* Karr, 19 N. J. Eq., 427.
[4] Kitsmiller *v.* Kitchen, 24 Iowa, 163.

and that judgment on the thirteen others would be set aside on a motion alleging the want of a legal summons.[1]

§ 1151. **Scire Facias.**—A judgment on a *scire facias*, served without the citation and copy of the petition required by statute, on the administrator of a deceased defendant, who was not served with process in his life-time, was held to be erroneous.[2]

§ 1152. **Should Contain the Name of Defendant.**—A further essential requisite to a good and sufficient summons is, that it should contain the name of the party served. Accordingly, it was held, where a summons against several joint defendants did not contain the names of all those served, it was fatally defective.[3]

§ 1153. **Omission of Name Held Immaterial.**—On the other hand, it was held in another case, under a different statute, that the omission to insert in a summons, served upon one of several defendants, the name of the co-defendants first served, except as the same was by the clerk indorsed on the process, would not render such summons void, nor even furnish grounds for a motion to set the same aside at the instance of the defendant last served.[4] This was under a statute authorizing the issuance of "a branch summons," to be served without the county in which the forum was located, and within which service was had upon the co-defendant first served. The clerk was required to indorse the branch summons so as to show its connection with the original, and, in doing so, in this instance included in his indorsement the names of the co-defendants.

[1] Williamson *v.* Wardlaw, 40 Ga., 702.

[2] Lyendecker *v.* Martin, 38 Tex., 287.

[3] Bendy *v.* Boyce, 37 Tex., 443; Anderson *v.* Brown, 16 Tex., 554; Battle *v.* Eddy, 31 Tex., 368; Portwood *v.* Wilburn, 33 Tex., 713. Mere error in name, however, will not generally affect the service. If served on the proper party, the summons will ordinarily be sufficient, and if a name be omitted it may be supplied after service. See Part VII, SERVICE, § 1293 *et seq.*

[4] Lewis *v.* Grace, 44 Ala., 307.

§ 1154. Venue.— And though it is important that the *venue* should be correctly stated in the process, to the end that the party served may know before what tribunal he is called to make his defense, still if the proper county is mentioned in the margin, the insertion of a different county in the body of the summons would not render the same void. Such a defect may be cured by amendment.[1]

§ 1155. Immaterial Variations and Omissions.— So immaterial omissions and slight variations will not be regarded as of sufficient importance to affect the judgment. As where the seal of the court, or a copy thereof, was omitted from the copy with which the defendant was served, or where the court, which was legally styled the "court of common pleas," was carelessly and erroneously designated in the process as the "common pleas court," these trifling departures from literal accuracy were held to be immaterial, for the manifest reason that they could not possibly mislead the defendant.[2] So where a notice of mechanic's lien stated the amount of the account, described the property to be charged, and the account, specifying the materials, was attached to the notice and filed with the clerk, it was held a substantial compliance, though the account was not sworn to as required.[3]

§ 1156. Requirements of Different States as to Certainty of Summons.— There is not the same degree of particularity required by the statutes of the different states, in the description of the action to which the defendant is called upon to answer, or in stating in the process the cause or causes of action. In Rhode Island the summons is simply required to state that defendant is to answer "in an action of ——, as by declaration to be filed in court will be fully set forth." The statute was held to be sufficiently complied with where the blank in the summons was filled by —"an action on the case for trover and conversion of

[1] Relfe *v.* Valentine, 45 Ala., 286.
[2] Hughes *v.* Osborn, 42 Ind., 450.
[3] Hassett *v.* Rust, 64 Mo., 325.

certain personal property," without specifying particularly the chattels alleged to have been converted.[1]

§ 1157. **The "Purpose" to be Stated.**— So where the statute required all writs of summons in civil actions to state the *purpose* for which the defendant was summoned, it was held that it was not necessary to describe the nature of the suit any further than to state when and where it was to be answered, and the name of the plaintiff. The construction placed upon the statutory requirement to "state the purpose for which the party is summoned," was that it was intended to give notice to the defendant that he was not summoned to appear as a witness or for any other purpose than to defend himself in a suit of the plaintiff who was named in the summons. Therefore, it was held to be a sufficient compliance with this provision of the statute when the defendant was summoned to appear "to answer an action at the suit of" the plaintiff — naming him.[2]

§ 1158. **Infant Defendants.**— Greater strictness is generally required in the observance of the rules of practice in cases involving the rights of infant parties. So, where the infant distributees under a will were made defendants in a suit for distribution, but were not served with process, either actually or constructively, they were held to be not bound by the judgment, notwithstanding they were plaintiffs in another suit, in which they appeared without next friend or guardian, which suit was consolidated with the one in which they had been made defendants.[3]

§ 1159. **When Returnable.**— Another feature in which a strict compliance with statutory requirements is necessary to uphold the process, is in making it returnable at the proper term of court. At common law, and under the statutes of some of the states, the original process should be made returnable at the term of court next succeeding the date of service. Regarding the issuance of process as the

[1] Slocomb *v.* Powers, 10 R. I., 255.
[2] Ritter *v.* Offutt, 40 Md., 207.
[3] Bush *v.* Bush, 2 Duvall (Ky.), 269.

commencement of the action, and following the rule that every action is to stand for trial at the first term after it is commenced, there could not be the intervention of a term of court between the *teste* and return of the writ. Process made returnable on a day beyond the next succeeding term, except where the common law rule is abrogated by statute, would not only be held irregular, but absolutely void, and any judgment predicated upon such process would be a nullity.[1]

§ 1160. Substantial and Technical Defects.— It has been asserted by some of the authorities that not all the requisites to perfect process are indispensable to the support of the *jurisdiction* thereby sought to be acquired over the person of the defendant. The omission of some things regarded as necessary to the protection of a judgment against a direct proceeding to set the same aside, have been held not to justify a collateral attack upon a judgment once obtained.[2] Such defects are those which relate rather to the *regularity* of the process by which jurisdiction is obtained, than to the question whether *any process* has been issued and served. It is the difference between *defective* process and *no* process. Where the process is merely defective, it is held that it may be sufficient to give the court jurisdiction of the person of the defendant, when it may try all the issues between the parties, and may determine the question of the sufficiency of the process upon which its jurisdiction depends, as one of those issues. Should the case go to judgment, it will be presumed that the court has decided the process to be sufficient, and its judgment can only be affected by a direct proceeding for the purpose of setting

[1] Shirley *v.* Hagar, 3 Blackf., 225; Crocker *v.* Dunkin, 6 Blackf., 535; Carey *v.* Butler, 11 Ind., 391; Will *v.* Whitney, 15 id., 194; Rigsbee *v.* Bowler, 17 id., 167; Atkinson *v.* Taylor, 2 Wilson, K. B., 117; Parsons *v.* Loyd, 3 id., 341; Burk *v.* Barnard, 4 Johns., 309; Briggs *v.* Sneghan, 45 Ind., 14.

[2] Pursley *v.* Hays, 22 Iowa, 11; Westoby *v.* Day, 22 Eng. L. & Eq., 261. But see Pollard *v.* Wegener, 13 Wis., 569.

the same aside, or by seeking the reversal thereof in a court of appellate jurisdiction.[1]

§ **1161. Jurisdiction.**— "Jurisdiction," it has been said, "consists not in the declaration of right, but in the right to declare it, and in declaring it rightly; and therefore presupposes that proper efforts have been made to bring those parties into court who are to be affected by its exercise."[2] Just what are proper efforts to bring those parties into court who are to be affected by the exercise of its right to declare, is beset with some difficulty, in view of the distinction between mere irregularities and fatal defects in the process. Though process regarded as defective, and liable to be quashed, has been declared sufficient to protect the judgment from collateral attack,[3] still it cannot be maintained that a mere attempt or pretense at the issuance and service of process would be sufficient to give the court even the temporary jurisdiction necessary to pass upon the sufficiency of the process. Were the rule otherwise, there could be no such thing as a void judgment, fair on its face. There must be a point of departure from the legal requirements in this respect where the pretended process would be held no process at all; otherwise the more complete the fraud in making a show of service of process, the better would be the prospect of success. Many of the defects which utterly vitiate the process, as well as those characterized in some of the cases as mere irregularities, occur with respect to the *service and return* of process, and will be illustrated by cases cited in subsequent parts of this chapter devoted to the *return*. From a careful considera-

[1] Sm. Lead. Cas., 697, 700; Borden *v.* State, 11 Ark., 519; Sheldon *v.* Wright, 5 N. Y., 497; Wright *v.* Marsh, 2 G. Greene, 109; Ewing *v.* Higby, 67 Ohio, 343; Paine *v.* Mooreland, 15 Ohio, 435; Morrow *v.* Weed, 4 Iowa, 77; Shawhan *v.* Laffen, 24 Iowa, 217; Myers *v.* Overton, 4 E. D. Smith (N. Y.), 428.

[2] *Ex parte* Kinning, 4 C. B., 507; Kinning *v.* Buchanan, 8 id., 271; 1 Sm. Lead. Cas., 839.

[3] Morrow *v.* Weed, 4 Iowa, 77; Shawhan *v.* Laffen, *supra*, § 1160; Fagg *v.* Clements, 16 Cal., 389.

tion of these cases, as well as those already cited, conflicting as some of them will be found, we may safely deduce the rule that where a departure from the requirements of the law, in regard to the issuance or service of process, is in any substantial matter affecting the rights of the defendant, the process will be a nullity, and the judgment may be collaterally attacked. What are matters of substance, and what matters of mere form, can best be shown by further reference to the authorities.[1]

[1] See *post*, VIII, and cases cited. Where a party defendant upon whom process has been defectively served, or who has been served with process irregularly issued, or even where he has been served with no process at all, appears to the action, and answers, demurs generally, asks or consents to a continuance, his appearance will amount to a complete waiver of process. Briggs *v.* Sneghan, 45 Ind., 14; Peters *v.* St. Louis, etc., R. R. Co., 59 Mo., 406; Reading *v.* Ford, 1 Bibb, 338; Ryan *v.* Driscoll, 83 Ill., 415; Biles *v.* Stanton, 69 Ill., 51; Holman *v.* Eiterman, 83 Ill., 92; Randall *v.* Falkner, 41 Cal., 242. But a *special* appearance for the purpose of objecting to irregularities in, or failure of, process cannot be construed into a waiver of the irregularities complained of. Mullen *v.* Higgins, 13 Abb. Pr., N. S., 297; Jones *v.* Byrd, 74 Ill , 115.

II. Notice of Trial.

§ 1162. Required by Statute.
1163. Example from New York Code.
1164. English Rule.
1165. Should Not be Vague or Misleading.
1166. Should Specify the Particular Suit.
1167. May be Noticed for Trial by Either Party.
1168. Sufficiently Explicit as to Term.
1169. Party Notified May Rely on Term Designated.
1170. Served Before Issue Joined.
1171. Does Not Depend Upon Discretion of Court.
1172. Service Upon Party or Attorney.
1173. Effect of Continuance.
1174. Effect of Amendment.
1175. Notice Waived.
1176. Where Judgment Attacked for Want of Notice.
1177. Must be for Substantial Defects.
1178. Statement of Wrong Day.
1179. Failure to Place on Calendar.
1180. Wisconsin Code.
1181. Time Under English Rule.

§ 1162. Required by Statute.— The notice treated of in this place is, in general, the creature of statute law, and is sometimes prescribed and regulated in its details by the rules of court, for the reason that the statute does not prescribe with sufficient definiteness its form and contents, nor its manner and mode of service. In many of those states where the code has been adopted, and the issues between parties are made by pleadings filed in court, within certain prescribed periods, *notice of trial* is not required to be served upon the party or his attorney. Where the answer is filed on or before a certain day of the return term, and the plaintiff is required either to reply or demur on or before a certain day after the filing of the answer, the court will take notice when an issue, either of law or fact, is reached. When the pleadings, with the exception of the first, are filed in term time, the parties are supposed to be fully advised of the progress of the written altercations they are

conducting through their attorneys, and the trial "calendar" or "docket" will notify them when the cause is set down for hearing.

§ **1163. Example from New York Code.**— The system of practice which includes this notice is therefore peculiar to certain states of the Union,[1] and to Great Britain. As an example of the provisions of the code of procedure in this respect, we shall incorporate a section which embraces enough to show not only the object of such a notice, but will give a general idea of its principal requisites: "At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or law; and, if an issue of fact, whether it is triable by a jury, or by the court without a jury. The note of issue must be filed at least eight days before the commencement of the term; unless a different time is prescribed in the general rules of practice. The clerk must thereupon enter the cause upon the calendar, according to the date of the issue. In the city and county of New York, when a party has served a notice of trial, and filed a note of issue, for a term at which the cause is not tried, it is not necessary for him to serve a new note of issue for a succeeding term; and the action must remain on the calendar until it is disposed of." [2]

§ **1164. English Rule.**— The English rule is that, previously to the sittings or assizes at which the cause is to be tried, the plaintiff should give due notice of trial.[3] The manner and mode of giving such notice, as well as the time between the service of the notice and the sittings, are regulated, to a considerable extent, by the rules of the court

[1] New York, Wisconsin, New Jersey, Minnesota, and some others.

[2] Throop's Code (N. Y.), § 977.

[3] Tidd's Prac., 753.

where the cause is triable. These rules differ, in some minor particulars, in the courts of queen's bench, exchequer and common pleas, respectively, but generally receive about the same liberal construction in either of these tribunals. The tendency of the decisions seems to be to render the notice of trial subservient to the purpose for which it was designed, though in doing so the court may tolerate a departure from technical accuracy.[1]

§ 1165. Should Not be Vague or Misleading.— In the New York code, the contents of the "note of issue," to be filed with the clerk, are prescribed with sufficient definiteness, while the notice to be served upon the opposite party or his attorney is, by the section quoted, simply required to be served at least fourteen days before the commencement of the term, and as to what it shall contain, is left to the discretion of the party giving it. But enough is intended, by its designation as a *notice of trial*, to indicate that it should be sufficiently explicit to convey to the party notified definite information of the fact that the cause is to be entered upon the calendar for trial. The absence of any statutory requirements as to the statements to be contained in the notice, as well as the circumstances under which it is given, would not seem to impose the duty of observing technical accuracy in its statements; but still, it should not be so vague or general as to mislead the opposite party or his attorney.

§ 1166. Should Specify the Particular Suit.— So, where two actions, only one of which is noticed for trial, are depending between the same parties, and the same attorneys are employed to prosecute and defend, the notice should specify the particular action intended by the giver of the notice, as the one to be tried. Otherwise the notice may be considered too indefinite, and consequently insufficient to meet the requirements of the statute.[2] So, also, it has been held, where a plaintiff who notices a cause for

[1] Tidd's Prac., 754 *et seq.*, with cases cited in notes.

[2] Lisher *v.* Parmelee, 1 Wend., 22.

trial intends to move for an assessment of damages on default, that such intention should be expressed in the notice.[1]

§ 1167. May be Noticed for Trial by Either Party.— As the case may be noticed for trial by either party, and may be at issue on a set-off, counter-claim, or cross-demand, by which the defendant asks affirmative relief, should the defendant, in such a case, notice the cause for trial, it has been thought that the notice should express the intention to demand the relief prayed in his answer.[2]

§ 1168. Sufficiently Explicit as to Term.— Notwithstanding the notice should be sufficiently explicit to direct the party's attention to the term at which the cause would be for trial, still it has been held, where the notice was without date, and, after mentioning the court in which the cause was pending, informed the party notified that such cause would "be brought on for hearing at the next term of said court," that such notice was not inoperative on account of the absence of the date, from which it might have been gathered what term was meant by "next term."[3]

§ 1169. Party Notified May Rely on Term Designated. But when the term has been designated, the party notified has a right to rely upon the statements contained in the notice. And if he should not find the cause upon the calendar for the term for which he has received notice of trial, he is not bound to examine for each successive term thereafter, in order to learn whether the cause is in a condition to be called up for trial.[4]

§ 1170. Served Before Issue Joined.— The notice should probably be served, in every instance, as is provided in the New York code of procedure,[5] *after* issue joined, and not *before*. But this has reference only to the issue to be tried. So, where there were two counts in a declaration, to the

[1] Voorh. Code (1864), 459.
[2] *Ibid.*
[3] Brushaban *v.* Stigemann, 22 Mich., 199.
[4] Culver *v.* Felt, 4 Rob. (N. Y.), 681.
[5] *Supra.*

second of which there were several *pleas*, and to the fourth plea a special replication upon which issue was not joined when the notice of trial was served by plaintiff, the declaration was amended by striking out such second count. It was held that the notice of trial was effectual as to the first count, and defendant declining to appear further, there was a verdict and judgment for plaintiff.[1] It has been held, however, in that state, that the plaintiff, on serving a replication, may at the same time deliver a notice of trial; but the proceeding is subject to defeat or modification by the subsequent delivery of a demurrer by defendant. And should there be issues of fact joined on some of the pleas, and plaintiff does not join in demurrer, but takes a verdict, he holds the same dependent upon the event of the demurrer.[2] It has also been held that notice of hearing cannot properly be served until after the return day in the writ.[3]

§ 1171. Does Not Depend Upon Discretion of Court.— Where defendant has appeared he is entitled to notice of trial. His right to such notice does not depend in any degree upon the discretion of the court. Whatever may be the circumstances of the case, the court cannot dispense with the service of such notice and render a judgment against defendant which may not be set aside.[4]

§ 1172. Service Upon Party or Attorney.—But the service may be either upon the party or his attorney, except where the statute or the rules of court expressly provide that a preference shall be given to service upon one or the other.[5] The manner and mode of service is much the same as that of serving other notices in the course of practice. In one case, where the service was by leaving a copy of the notice at the office of the plaintiff's attorney of record,

[1] Miller *v.* Stocking, 22 Wend., 623.

[2] Beresford *v.* Geddes, Law Rep., 2 C. P., 285.

[3] Miles *v.* Goffinet, 16 Mich., 280.

[4] Tracy *v.* Steam Faucet Manuf. Co., 1 E. D. Smith (N. Y.), 349; Tidd's Prac., 753.

[5] *Ibid.*

who was absent from the state, and also by personal service upon the plaintiff, the sufficiency of the service was questioned, but was sustained by the court, upon the ground that, as the absent attorney still kept an office within the state, and if he had withdrawn from the case and another had not been retained the party might be personally served.[1]

§ 1173. Effect of Continuance.— When from any cause the case is not tried at the term for which the notice is given, not only is it unnecessary, as provided by the New York code,[2] to file a new note of issue, but under similar code provisions it has been held that the party who first noticed the case is not required to give a new notice of trial.[3]

§ 1174. Effect of Amendment.— So it has been held, where a cause was regularly noticed for trial and placed upon the calendar, that an amendment of the pleadings would not necessitate a new notice.[4]

§ 1175. Notice Waived.— An irregularity in a notice of trial, or even a failure to give any notice at all, may only be taken advantage of before trial, for the obvious reason that by proceeding to trial without objection the party waives notice.[5]

§ 1176. Where Judgment Attacked for Want of Notice.— Where there is an entire absence of notice of trial, or even where such notice is insufficient or irregular in any material respect, the judgment obtained by default in such cause may be set aside, by a direct proceeding for that purpose.[6]

§ 1177. Must be for Substantial Defects.— But in passing upon the sufficiency of a notice of trial, the court will not set aside the judgment for mere verbal inaccuracies

[1] Harwood *v.* Smethurst, 30 N. J. L., 230.
[2] *Supra.*
[3] Claudet *v.* Prince, 2 Q. B., 406.
[4] Stevens *v.* Curry, 10 Minn., 316.
[5] Commonwealth *v.* Intoxicating Liquors, 13 Allen, 561.
[6] Jenks *v.* Payne, 15 Johns., 399.

which may or may not be prejudicial to the rights of the party complaining of want of notice; as an error in a name, or the day of the week on which the term commences. The matter to be determined is whether the party or his attorney was misled by the defect, and in deciding this question the court will not be restricted to the face of the notice, but will inquire into all the other circumstances.[1]

§ **1178. Statement of Wrong Day.**— As where the day on which the term commenced was given as "the third Tuesday" instead of "the third Monday," and on the Wednesday following the third Tuesday the party who had noticed the cause for trial took an inquest; a motion to set aside the inquest was denied because the attorney upon whom the notice was served had retained the same, and it did not appear that he was in any wise misled by its inaccurate statement of the day of the commencement of the term.[2]

§ **1179. Failure to Place on Calendar.**— But where the defendant had noticed the cause for trial and had failed to place it upon the calendar pursuant to such notice, and the plaintiff's attorney attended the court on the second day, but finding no such cause on the calendar, and being assured by the partner of defendant's attorney that there was no intention to move in the case, gave it no further attention, an order of dismissal taken by defendant was held irregular, and was set aside because plaintiff's attorney was clearly misled.[3]

§ **1180. Wisconsin Code.**— The Wisconsin code differs somewhat from that of New York with respect to notices of trial. The latter has already been copied.[4] The former provides that "at any time after issue joined in any civil

[1] Wolfe *v.* Horton, 3 Caines, 86; Bander *v.* Covill, 4 Cow., 60; Down *v.* Rice, 11 Wend., 178.

[2] N. Y. Cent. Ins. Co. *v.* Kelsey, 13 How. Pr., 535; Bander *v.* Covill, 4 Cow., 60; Anonymous, 1 Johns., 143; Jackson *ex dem.* Davis *v.* Bronson, 4 Cow., 51.

[3] Browning *v.* Paige, 7 How. Pr., 487.

[4] *Ante*, page 589.

action, either party may bring the same on for trial at any term of the court at which the same is triable, by giving notice of trial at least ten days before such term."[1] In construing this section it was held that the language clearly indicated that the party who would force the other to trial must himself give the notice. The intention of the statute was not merely to secure the placing of the cause upon the calendar, but was intended to modify or repeal a former statute providing that either party, in the absence of the other, might call any case upon the calendar, up for trial. And where the case was noticed for trial by the defendant, plaintiff could not, under the provisions of the later statute, call the case up and take judgment in the absence of the defendant.[2]

§ **1181. Time Under English Rule.**—In England, where the rule for "town causes" was eight days' notice to those who were resident in town, or within forty computed miles thereof, and fourteen days to those who resided more than forty miles distant, it was held that a party who, since the institution of the suit, had removed to the distance of forty miles, was entitled to the longer notice.[3] But to entitle a party who had removed from town after the commencement of the suit, to fourteen days' notice of trial, it was also held that he should give the opposite party notice of such removal.[4] And where defendant had constantly resided in town from the time of the arrest, though his home was more than forty miles from town, it was held that in a town cause he was only entitled to eight days' notice of trial.[5]

[1] Laws Wis., 1859, chap. 71, § 1; Stat. Wis. 1871, p. 1494, § 9. In certain actions specified, the defendant may notice the action for hearing on trial, both upon questions of law and fact, regardless of whether issue has been joined upon the facts or not. Id., p. 1495, § 10.

[2] Buckley *v.* Lewis, 20 Wis., 490.

[3] Spencer *v.* Hall, 1 East, 688.

[4] Rochfort *v.* Robertson, 12 East, 427.

[5] Lloyd *v.* Hooper, 7 East, 624.

III. Notice of Motions and Other Interlocutory Proceedings.

§ 1182. Motions.
1183. Notice by Entry in Book.
1184. When Required.
1185. Presence of Counsel Will Not Waive.
1186. Parties Charged with Notice of Motion.
1187. Motion in the Nature of Summary Proceeding.
1188. Motion to Set Aside Sheriff's Sale.
1189. Filed in Term Time.
1190. Examples Under Different Statutes.
1191. Motion to Dismiss Appeal.
1192. Sufficiency of Notice.
1193. Substantial Accuracy.
1194. Against Constable.
1195. Designation of Court.
1196. Date of Filing.
1197. Circumstances Affecting Sufficiency.
1198. Notice Generally in Writing.
1199. Service of Notice.
1200. Upon the Party Affected.
1201. Time of Notice.
1202. Motion for New Trial.
1203. Waiver by Appearance.
1204. Notice of Reference.
1205. Notice of Reinstatement.
1206. Rule to Show Cause.
1207. Examination of Accounts.

§ 1182. Motions.— The motions that are made in the progress of a trial, or used to institute proceedings in court, are too numerous and diverse in character to render it either practicable or useful, for the purposes of this work, to attempt an enumeration of them, in order to state when and under what circumstances a notice of such motion should be given to the opposite party, or might be dispensed with. Neither is it necessary to set out in detail the provisions of the various statutes upon this subject. It will be sufficient to give such general rules as may be extracted from the judicial construction given to statutes bearing upon the sub-

ject, and to endeavor to properly set forth the methods favored by the courts for imparting notice of such motions.

§ 1183. Notice by Entry in Book.—The practice of serving the opposite party with notice of motions is not at all uniform. In some of the states the only notice received of the filing of an interlocutory motion, by the party to be affected thereby, is by its filing in open court, or by an entry in a book, variously designated as "Motion Docket," "Law Docket," or "Law Calendar," kept for that purpose, in court during term time, and in the office of the clerk of such court during vacation. This book is at all times open to inspection, and when a motion is entered there, the attorney for the opposite party is presumed to be fully notified of the pendency of such motion. Even the keeping of such book is not always prescribed by statute, but is in some instances left to the discretion of the court, to be laid down as one of its rules or entirely omitted, as may be deemed most expedient. We shall not attempt to enter minutely into a consideration of such notices of motions as are given in this manner, but shall confine our attention to such as are given by the mover or his attorney to the party to be affected, or the attorney of such party, by means of regular service of such notice in writing.

§ 1184. When Required.—And first, as to when notice of a motion should be given. In general, when the motion extends to and affects the interest of the party against whom the motion is made beyond his process, such party or his attorney must be served with notice; as, where the motion is by defendant, to have an execution against him entered satisfied. Though the motion merely affected the process, the party being supposed to be present in court with his process, it was held such motion might have been made without notice.[1]

§ 1185. Presence of Counsel Will Not Waive.—However, it is not to be inferred that the mere presence of the

[1] Haley *v.* Williams, 8 Sm. & M., 487.

party or his attorney in court when the motion is made will always be sufficient to dispense with a notice of such motion. On the contrary, it has been held that the certificate of a judge that counsel of the adverse party was in court when a motion was made, but without stating that such counsel had notice or knowledge of the motion, was not sufficient to show notice to him.[1]

§ 1186. Parties Charged with Notice of Motion.— Elsewhere it has been held that when a party is once in court, he must, at his peril, take notice of all *orders* and all pleadings *filed by order of the court.*[2] But the distinction between motions or pleadings filed by order of the court, and those filed by the party at his own instance, is quite obvious.

§ 1187. Motion in the Nature of Summary Proceeding.— Where the motion is in the nature of a summary proceeding against some one who has not already been brought in by process, notice of such motion should always be given. As where it is for the removal of a jailer or other ministerial officer for alleged malfeasance or misfeasance, such motion should not be sustained where the officer has not been duly notified of its pendency against him.[3] Where the motion was for judgment against a sheriff for making a false return, it was held that to allow judgment to go according to such motion, without giving the sheriff such notice as would enable him to appear and make his defense, would be equivalent to the prosecution of a civil suit against a defendant upon whom original process had never been served. He would not have his day in court, and hence such judgment would be absolutely void.[4]

§ 1188. Motion to Set Aside Sheriff's Sale.— So, also, should notice be given of a motion to set aside a sheriff's

[1] Shotwell *v.* Rowell, 30 Ga., 557.

[2] Williams *v.* Miller, 1 Wash. Terr., 105. See Meredith *v.* Santa Clara, etc., Min. Ass'n, 60 Cal., 617.

[3] Gorham *v.* Luckett, 6 B. Monr., 146.

[4] Jenkins *v.* State, 33 Miss., 382.

sale,[1] or to set aside an order of court made at a prior term of court;[2] in either of which cases the notice should be given to all parties interested. But a motion made to set aside a verdict, rendered at the same term at which the motion was made, was held not to require any formal notice, because being made at the same term at which the trial was had, it thereby became a part of the trial.[3] Nor is notice necessary of a motion to set aside a default entered by a justice of the peace, even in states where notice of motion is generally required.[4]

§ 1189. Filed in Term Time.—It has also been held that motions filed in term time do not require the service of notice on the opposite party, when such motion has reference to a proceeding before the court at the term at which the motion was made.[5]

§ 1190. Examples Under Different Statutes.—In general, the codes require notice to be given of an intended motion for a new trial.[6] Also of a motion for alimony incident to a decree of divorce, which is in the nature of a summary proceeding, and the notice answers the same purpose as the original process in the litigation of any claim or demand, and consequently should be served the full time prescribed by statute for the service of such notices; otherwise they should not be heard.[7] But under a statute of the state of Georgia, it was held that where the object of the motion was to establish copies of office papers, notice was not indispensable.[8]

§ 1191. Motion to Dismiss Appeal.—Where a motion was made to dismiss an appeal, it was held that as the par-

[1] Osborn *v.* Cloud, 21 Iowa, 238.
[2] Keeney *v.* Lyon, 21 Iowa, 277.
[3] Hansen *v.* Fish, 27 Wis., 535.
[4] Stivers *v.* Thompson, 15 Iowa, 1.
[5] Wagner *v.* Tice, 36 Iowa, 599.
[6] Killip *v.* Empire Mill Co., 2 Nev., 34; Coveny *v.* Hale, 49 Cal., 552; Markward *v.* Doriat, 21 Ohio St., 637.
[7] Wilde *v.* Wilde, 2 Nev., 306.
[8] Saunders *v.* Smith, 3 Ga., 121.

ties were supposed to be in court after continuance for collateral motions, they were not entitled to any other notice than the entry of such motion on the law docket, according to the practice of the court.[1]

§ 1192. **Sufficiency of Notice.**— Next, as to what is sufficient notice of a motion. Where formal notice is required at all, beyond the entry of the motion itself in the docket or calendar, the almost universal requirement is that it shall be reduced to writing, and regularly served upon the party or his attorney. And such notice should contain a statement sufficiently specific and certain to advise the party so served of the nature of the motion to be made and of the particular matter in controversy to be affected by such motion. And where the motion is to be directed to a matter affecting the interests of the party notified, and he would have the right to explain or deny by affidavit the matter constituting the grounds alleged for the motion, such ground should be stated with reasonable certainty in the notice.[2]

§ 1193. **Substantial Accuracy.**— As in other matters of practice, so in this, is the notice prescribed one which depends for its sufficiency more upon a substantial subservance of the objects and purposes for which it was designed than upon any technical precision of its statements. So, even where the motion noticed was in the nature of a summary proceeding under the statute, for the purpose of charging the party notified with a debt, it was held sufficiently definite if it described with reasonable certainty the debt with reference to which the motion was to be made.[3]

§ 1194. **Against Constable.**— So, where the motion was against a constable, charging him with neglect of duty, and was in the nature of a pleading, substantial certainty in the notice was sufficient. The judgment with reference to

[1] Papin *v.* Buckingham, 33 Mo., 454.

[2] Brower *v.* Brooks, 1 Barb., 423; Freeborn *v.* Glazier, 10 Cal., 337.

[3] Colgin *v.* State Bank, 11 Ala., 222. See Barbaries *v.* Gregory, 64 Cal., 230.

which the neglect was alleged, being described as against "P. and others," while it appeared in evidence that it was against "P. & L.," the error was held immaterial.[1] But where the motion noticed was against a constable for neglect of duty in not paying over money collected on claims placed in his hands, the notice was held fatally defective for not averring that he had collected any money on such claims.[2]

§ **1195. Designation of Court.**—Where the notice designates the court in which the motion is to be made, the place of holding such court, being a matter of which every one is supposed to take notice, need not be stated in the notice in order to render the same sufficient.[3]

§ **1196. Date of Filing.**—But where a motion is to be made for judgment, the notice should give the correct date when the motion will be made, for the same reason that the original process is required to be specific in this particular. It was accordingly held, where notice was given that a motion for judgment against a sheriff would be made on the *fourth* of the month, and such motion was filed on the *third* and ordered to lie over, and was taken up subsequent to the fourth and judgment rendered thereon, that such judgment was void.[4] But where the notice was given of a motion to be made on the twenty-fifth of the month, and the court adjourned over that day, it was held that the motion might be heard on a day subsequent to the twenty-fifth without a new notice.[5]

§ **1197. Circumstances Affecting Sufficiency.**— The sufficiency of the notice often depends upon collateral circumstances. As where the motion was for judgment on a bond, given to suspend a sale of property levied on to

[1] Hix *v.* Cornelison, 7 Coldw. (Tenn.), 299.
[2] Barrett *v.* Smith, 4 W. Va., 709.
[3] Brown *v.* State, 8 Heisk. (Tenn.), 871.
[4] Foster *v.* Wade, 4 Met. (Ky.), 252.
[5] Platt *v.* Robinson, 10 Wis., 128.

satisfy an execution, the sufficiency of the notice was determined by considering it in connection with the bond.[1]

§ 1198. **Notice Generally in Writing.**— The rule seems almost universal that the notice should be written, except where there is an express waiver, or such conduct by the party as will estop him from denying the receipt of notice. It was accordingly held that an informal verbal notice of a motion for a new trial, given out of court, while in conversation with opposing counsel, would not be sufficient.[2]

§ 1199. **Service of Notice.**— Another important matter for consideration, in connection with this branch of the subject, is *service* of such notices; which necessarily includes *upon whom* and *by whom* the service of notice should be made, as well as *the time and manner* of making such service. The rules applicable to the service of other notices will be found generally applicable to service of notice of a motion, and these rules we shall endeavor to illustrate more fully elsewhere.[3] It may be proper to state here, however, that the notice of a motion should always be served upon the party to be affected thereby, or upon his attorney of record, if he have one.[4] When the motion is one arising in the course of the trial of a cause, a decided preference seems to be given to service *by* the attorney of the party giving the notice, and *upon* the attorney of the opposite party, not only as a matter of general convenience, but as a positive rule of practice, laid down by some of the courts.[5]

§ 1200. **Upon the Party Affected.**— In the case of Walker *v.* Scott,[6] it was decided that the judgment, which

[1] Smith *v.* Wells' Adm'rs, 4 Bush (Ky.), 92.

[2] Killip *v.* Empire Mill Co., 2 Nev., 34; Pearson *v.* Lovejoy, 53 Barb. (N. Y.), 407; Butler *v.* Mitchell, 17 Wis., 52; Bear River and Auburn, etc., Co. *v.* Boles, 24 Cal., 354.

[3] See *post*, VII, Service.

[4] Walker *v.* Scott, 29 Ga., 392.

[5] Harding *v.* Stafford, Say. Rep., 133; Halsey *v.* Carter, 6 Rob. (N. Y.), 535.

[6] *Supra*, § 1199.

should have been against the principal and his surety, being by mistake entered against the principal alone, might, on motion, be amended by adding the name of the surety, and it would not be necessary to serve notice of such motion on the principal. This holding was obviously for the reason that the principal was not the party interested in the motion.

§ 1201. Time of Notice.— The length of time for which the notice must be given of an intended motion, before the same will be considered by the court, varies according to the character of the motion, as well as the difference in the practice of the different courts; but where no fixed rule is prescribed by statute or rule of court, it will be sufficient if the notice is served a reasonable time before the court takes action in the matter.[1] And even where the time is fixed by rule, it is frequently subject to the will of the court, in the exercise of a sound discretion, to *shorten the time* in particular instances, before the service of the notice.[2]

§ 1202. Motion for New Trial.— It has been held that moving for a new trial will continue the jurisdiction of the court over the cause beyond the term, when due notice of the intention to so move has been given, and such notice is followed up by a statement or affidavit of what the motion will contain, made in due time; but if the notice and subsequent statement are not made within the statutory time, the court loses jurisdiction of the cause at the end of the term, and thereafter cannot set aside a judgment, however erroneous it may be.[3]

[1] Bruen *v.* Bruen, 43 Ill., 408; Coveny *v.* Hale, 49 Cal., 552; Dambmann *v.* White, 48 Cal., 439; Crowther *v.* Rowlandson, 27 Cal., 376; 8 Price, 503; Douglas *v.* Ray, 4 Durnf. & East, 552.

[2] Rogers *v.* McElhone, 12 Abb. Pr., 392. See Gray *v.* Nunan, 63 Cal., 220; Patrick *v.* Morse, 64 Cal., 462; Emeric *v.* Alvarado, 64 Cal., 529.

[3] State *v.* First National Bank, 4 Nev., 358; Caney *v.* Silverthorn, 9 Cal., 67; Calderwood *v.* Brooks, 28 Cal., 151. See People *v.* Center, 61 Cal., 191; Wittenbrock *v.* Bellmer, 62 Cal., 558. If the notice does not conform to the statute in respect to whether the motion should be made upon affidavits, it will not suffice. Hill *v.* Beatty, 61 Cal., 292; Farrell *v.* Jones, 63 Cal., 194.

§ 1203. **Waiver by Appearance.**— Irregularities in the notice, however, which might furnish sufficient grounds for overruling the motion, or even for setting aside the order or judgment based upon such motion, where the same had been sustained, may all be waived by an appearance for the purpose of contesting the motion when the same comes up for hearing.[1]

§ 1204. **Notice of Reference.**— One of the proceedings where notice becomes necessary is when a cause is by the court referred to a master, or to a special referee appointed for that purpose. If the order of reference is made in the absence of either party or his attorney, such absent party or attorney would be entitled to notice thereof, in some form. And when the reference is made, the parties or their attorneys should be duly notified of the hearing. This notice must be given in a reasonable time so as to enable the one notified to be in attendance at the time without using extraordinary diligence. So that, in one instance, three days' notice, where that time was barely sufficient, barring all delays, to allow the attorney of the opposite party to attend the hearing, was held insufficient.[2] But it has been held that where a cause is unnecessarily referred, all the facts necessary to a decree being in possession of the court, there is no necessity for notice to the opposite party of such reference.[3]

§ 1205. **Notice of Reinstatement.**— Where a cause has been finally disposed of by confirmation of the master's report, if either party desires to reinstate the case, for the purpose of instituting further proceedings in relation thereto, it must be upon due notice to the opposite party. And where such a case was reinstated at a term next succeeding the one at which the report was confirmed, without notice to the opposite party, it was held that all subsequent pro-

[1] Brown *v.* State, 8 Heisk. (Tenn.), 871.

[2] Strang *v.* Allen, 44 Ill., 428.

[3] Michigan Insurance Co. *v.* Whittimore, 12 Mich., 427; Kellogg *v.* Putnam, 11 Mich., 344.

ceedings and orders affecting the interests of the party not notified would not only be irregular, but absolutely void.[1]

§ **1206. Rule to Show Cause.**— Where a rule to show cause why a petition should not be dismissed had been continued indefinitely, and it was finally fixed for a time certain, it was held that the party against whom the rule was granted would be entitled to reasonable notice of the fixing thereof.[2] Upon the same principle, if the continuance was at the instance of the party subject to the rule, and the fixing of the rule was on his application or with his knowledge, the opposite party should have notice. But where a foreclosure suit was revived, by *scire facias*, against the heirs of a deceased mortgagor, under a statute requiring the filing of the response and the service of a copy on the attorneys of the plaintiff, it was held that the notice was not void by reason of its failing to fix a time for showing cause; because the practice in such cases was a matter of statutory regulation, and the fixing of the time by the notice was not required by statute.[3]

§ **1207. Examination of Accounts.**— An accounting party may be cross-examined on his accounts, after the same have been submitted. When this is done, he is generally entitled to notice of such cross-examination, and the notice should specify the points upon which the examination is to proceed.[4]

[1] Mulvey *v.* Carpenter, 78 Ill., 580.
[2] Hennen *v.* New Orleans & C. R. R. Co., 20 La. An., 544.
[3] Durbin *v.* Waldo, 15 Wis., 352.
[4] McArthur *v.* Dudgeon, 15 Eq. Cas., 102.

IV. Notice of Appeal.

§ 1208. Not Always Required.
1209. Written, and Served Upon Attorney.
1210. In Criminal Cases.
1211. Justices of the Peace.
1212. When Notice Serves as an Assignment of Errors.
1213. Grounds of Appeal.
1214. Assent to Judgment.
1215. Must be on Same Day.
1216. Must be Given in Time.
1217. Personal Service Not Required.
1218. Notice to be Given to Co-parties.
1219. Does Not Depend Upon Conflict of Interest.
1220. Waived by Appearance.

§ 1208. Not Always Required.— The rules governing the notice of appeal possess very few features of a peculiar character, to distinguish them from those applicable to notices of other court proceedings. Under the code practice of some of the states of the Union, there is practically no such thing as a notice of appeals, except where they are taken from judgments of justices of the peace and other inferior courts. The proceedings to perfect the appeal take place in open court, and the appellee is required to take notice of such proceedings, to the same extent as he would of the rendition of the judgment. But when the appeal is perfected during vacation, there may be certain acts, as signing of the bill of exceptions, and the like, of which the appellee should have notice.

§ 1209. Written, and Served Upon Attorney.— This, like most of the notices required in practice, should be written;[1] and, in civil actions where the opposite party appears

[1] Masterson *v.* Herndon, 10 Wall., 416; Larrabee *v.* Morrison, 15 Minn., 196. In this case it was held that an omission of the signature to the notice might be taken advantage of after admission of service. Tiffin *v.* Millington, 3 Mo., 418, where it is decided that such notice cannot be properly served by reading the same to the opposite party, but the writing must be delivered to him.

by attorney, may in every instance be served upon the attorney, and may be signed by the attorney of appellant.[1] In some of the states, in cases where an attorney has been employed, the service of the notice is *required* to be made upon him.[2]

§ 1210. **In Criminal Cases.**— There is perhaps no very good reason for a contrary rule in criminal cases, and where the appeal is taken by the defendant, the notice could be served upon the state's attorney. Where not so served, it was held that the appeal should be dismissed.[3] But it has been decided, when the appeal was taken by the state, that notice of appeal served upon defendant's counsel was not in compliance with the statute, and because the notice was not served upon the defendant in person, the appeal was dismissed.[4] Though, when the defendant cannot be found, the notice may be effectually served by posting it in the office of the clerk of the court.[5] However, it has been held that in case of an appeal from an order changing the place of trial, the notice should be served upon the clerk of the court in which such order is made.[6]

§ 1211. **Justices of the Peace.**— Under a statute of a state, where such notice was exacted in every case of an appeal from a judgment of a justice of the peace,[7] and appeals were held to be properly dismissed for the slightest variation from statutory requirements in the matter of describing the case, the authority of the person or officer making the service,[8] of the time of service, or any other essential

[1] Larrabee *v.* Morrison, *supra.*

[2] Abrahams *v.* Stokes, 39 Cal., 150; Tripp *v.* De Bow, 5 How. (N. Y.) Pr., 114. One notice of appeal from parts of two judgments, and from a special order after judgment, will not suffice. People *v.* Center, 61 Cal., 191; Wittenbrock *v.* Bellmer, 62 Cal., 558.

[3] People *v.* Fennel, etc. (Utah), 6 West Coast Rep., 837.

[4] State *v.* Brandon, 6 Kan., 243; State *v.* Baird, 9 Kan., 60.

[5] *Ibid.*

[6] Haas *v.* Weinhagen, 30 Wis., 326.

[7] Masterson *v.* Ellington, 10 Mo., 712; McCabe *v.* Lecompt, 15 Mo., 78.

[8] Tiffin *v.* Millington, 3 Mo., 418.

particular,[1] it was held that such notice might be executed by an agent in the name of his principal, and if it were doubtful whether he was properly authorized, parol evidence was competent to establish the fact.[2] And where the notice was signed by the person who appeared for the appellant, it was held immaterial that he did not describe himself as attorney for the appellant,[3] and that a want of notice might be waived by the appellee's appearance and moving to dismiss on account of an informality in the bond.[4]

§ 1212. When Notice Serves as an Assignment of Errors.— In the state of New York, the notice of appeal from an inferior court seems to serve the purpose in the appellate court of an assignment of errors or bill of exceptions. On appeal, or error, the appellant or plaintiff in error is confined to the ground of appeal assigned in the notice, or the error therein complained of, with the same strictness as parties to suits in courts of general jurisdiction are restricted to the allegations in their written pleadings.[5] And such notice is required to point out clearly the grounds of appeal. It was accordingly held, in an appeal from the judgment of the court of common pleas, that it was not sufficient for the notice to state that the judgment was against the law and evidence.[6]

§ 1213. Grounds of Appeal.— So, in case of an appeal from the judgment of a justice of the peace, *upon the law*, where the grounds of appeal assigned were that the evidence "was incompetent, did not support the judgment, that on it the plaintiff was not entitled to recover, and that the judgment was contrary to law," the notice was held in-

[1] Hempstead *v.* Darby, 2 Mo., 25; Cochran *v.* Bird, id., 141; Hayton *v.* Hope, 3 Mo., 53.

[2] Runkle *v.* Hagan, 3 Mo., 234.

[3] Rutledge *v.* Superior Court (Cal.), 6 West Coast Rep., 565.

[4] Rector *v.* St. Louis Cir. Ct., 1 Mo., 607.

[5] Delong *v.* Brainard, 1 Thomp. & C. (N. Y.), 1; Avery *v.* Woodbeck, 5 Lans. (N. Y.), 498; S. C., 62 Barb., 557. See Code of Procedure, N. Y., § 353.

[6] Begley *v.* Chose, 4 Daly (N. Y.), 157.

sufficient to sustain the appeal, because it did not point out specifically the errors in the judgment appealed from.[1] But where one good ground of appeal is assigned in the notice, it seems the appeal will not be dismissed, whether it be an appeal upon the *law* or the *facts;* as the provisions of the code[2] appear to apply to both alike.[3]

§ **1214. Assent to Judgment.**— Another requisite of the notice under the New York practice is that it shall contain an assent that, "if the judgment be affirmed, judgment absolute may be rendered against the appellant;" but where this is omitted by mistake, it may be supplied by amendment, even after the expiration of the time for appeal, *nunc pro tunc.*[4]

§ **1215. On Same Day.**— Under the code of civil procedure of the state of California, the filing of the notice of appeal, the undertaking and the service of notice must be effected on the same day. The notice may be served personally, or in any of the other modes provided by statute for the service of similar papers, and when the appeal fails for the want of timely notice, a new appeal may be taken.[5]

§ **1216. Must be Given in Time.**— So, also, where the practice under the code of another state[6] was to give ten days' notice of appeals from the judgments of justices' courts, it was held that a failure to give the notice precisely within the time would not be such a serious default as to preclude the party from the right to have his case reheard.[7]

§ **1217. Personal Service Not Required.**— The necessity for a relaxation of the strict rule requiring personal

[1] Delong *v.* Brainard, 1 Thomp. & C. (N. Y.), 1.

[2] See Voor. Code (1864), § 371; also §§ 353, 354, note.

[3] Younghaus *v.* Fingar, 63 Barb., 299; S. C., 47 N. Y., 99; Bixby *v.* Warden, 46 How. Pr., 239.

[4] Mott *v.* Lansing, 5 Lans., 516.

[5] Columbet *v.* Pacheco, 46 Cal., 650.

[6] Code Prac. North Carolina, § 535.

[7] Marsh *v.* Cohen, 68 N. C., 283. It was held in California that an appeal would be dismissed if notice were given prior to final judgment. People *v.* Center, 6 West Coast Rep., 150.

service of notice is perhaps more apparent in the notice of appeal than in any other. Were it not for the fact that some other mode than personal delivery of a written notice to the appellee is provided by the statutes of the different states, the courts would, in cases where personal service was impossible, be inclined to look favorably upon the substitution of such other modes as were prescribed in analogous cases. Otherwise a party who had succeeded in obtaining an unjust judgment, might, by avoiding personal service of notice, entirely defeat the right of appeal. But when the service is by any statutory method, the return should show the state of facts by which it was authorized.[1]

§ 1218. Notice to be Given to Co-parties.— It is not always sufficient to give notice of appeal to the opposite party. The interests of a co-plaintiff or co-defendant may be adverse to those of the party who complains of error in the judgment; in which event it is incumbent upon the party appealing to give notice of such appeal to such co-plaintiff or co-defendant.[2]

§ 1219. Does Not Depend Upon Conflict of Interest.— This rule of practice is of more general application than that requiring notice of appeal to the opposite party, and does not depend upon the existence of a conflict of interests between co-parties. In the supreme court of the United States, it was formerly required, when one or more of the vanquished parties desired to appeal or sue out a writ of error, that a summons should be served upon those who were willing to abide the judgment and have a *severance;* but latterly there has been adopted, as a substitute for such *summons and severance*, the service of a written notice upon such parties. And the mere allegation of the appellant, in his petition, that his co-parties failed to appear or refused to join, will not be sufficient. The record should show due service of notice upon the parties, or that they appeared

[1] Cunningham *v.* Warnekey, 61 Cal., 507; Wittenbrock *v.* Bellmer, 62 Cal., 558; Steele *v.* Merced County, 62 Cal., 6.

[2] Hiscock *v.* Phelps, 2 Lans. (N. Y.), 106; Reed *v.* Allison, 61 Cal., 461.

and refused to join in the appeal, and that the court granted an appeal to the party who prayed for it, as to his own interest.[1]

§ **1220. Waived by Appearance.**— Where, however, one of several co-plaintiffs or co-defendants appeals, and the others appear and refuse to join, this renders notice to them unnecessary, under the rule that a voluntary appearance of a party entitled to notice amounts to a waiver of such notice.[2] According to the same rule, the voluntary appearance of the appellee is regarded as a waiver of the notice of appeal, where such notice is required.[3] The indorsement of an acknowledgment of "due service" will obviate inquiry into the manner of service.[4]

[1] Masterson *v.* Henderson, 10 Wall., 416. See, also, as to statutory provision on the same subject, in the state of Indiana, 2 G. & H., 270, § 551. If any question can be said to be "settled" by numerous decisions, the construction of this statute, requiring notice from an appellant to his co-parties, may be considered at rest in that state. The appeal has been uniformly dismissed where notice was neglected. Knar *v.* Conway, 37 Ind., 257; Pittsburgh & C. R. R. Co. *v.* Elliott, 38 Ind., 153; id., 103; id., 226; id., 266; id., 589; id., 427; 39 Ind., 244; id., 393; id., 474; 40 Ind., 142; id., 195; id., 341; 41 Ind., 143; id., 277; 42 Ind., 386; id., 399; id., 477; id., 497; 43 Ind., 1; id., 472; id., 380; id., 381; id., 29.

[2] Rich *v.* Starbuck, 45 Ind., 310.

[3] But though consent may waive error or irregularity in giving the notice, where it is necessary to the jurisdiction of the appellate court, such jurisdiction cannot be conferred by waiver of notice. Oliver *v.* Harvey, 5 Oreg., 360.

[4] People *v.* Grigsby, 62 Cal., 482.

V. Notice of Taking Depositions.

§ 1221. When Required.
1222. Generally in Writing.
1223. What to Contain.
1224. Deemed Sufficient.
1225. Clerical Errors.
1226. Name of Officer.
1227. Witnesses Need Not All be Named.
1228. Conditional Notice Insufficient.
1229. Must be Signed.
1230. Time of Taking.
1231. Mistake in Date of Taking.
1232. General Requisites.
1233. Time of Service.
1234. Time Decided by Court.
1235. Computation of Time and Distance.
1236. Absence of Statute or Rule.
1237. Time Not Always Governed by Distance.
1238. Time Not Fixed by Special Circumstances.
1239. Except When Unusually Short.
1240. Statutory Time May be Shortened.
1241. Objections to Time — When Taken.
1242. Party Must Show Himself Entitled to Time.
1243. Service of Notice.
1244. Insufficient Service.
1245. Upon Several Co-parties.
1246. Strict Personal Service Not Required.
1247. Proof of Service.
1248. Upon Attorneys in Partnership.
1249. When Depositions to be Used in Two Cases.
1250. Postponement by Consent.
1251. Effect of Acknowledgment of Service.
1252. Alteration of Notice.
1253. Objections Waived.
1254. Waiver by Presence.
1255. May be Present Without Waiver.
1256. Effect of Adjournment Without Consent.

§ 1221. When Required.— When, for any purpose, one of the parties to a suit desires to take the testimony of a witness in writing, to be used upon the trial, in lieu of his oral testimony, whether it be to perpetuate such testimony

against the possibilities of the death or absence of such witness, or to obtain evidence where the witness is beyond the reach of a *subpœna testificandum* issuing out of the court where the suit is pending, it is necessary to serve the opposite party or his attorney with due and timely notice of the taking of such deposition; otherwise it may be suppressed on motion, or, in any event, will not be permitted to be offered in evidence, unless such notice has been waived by the party against whom the deposition is offered.[1] And it will be no answer to a motion to suppress a deposition for the want of notice, that the witness has since deceased, and unless the deposition is admitted his testimony will be utterly lost.[2]

§ **1222. Generally in Writing.**— As a general rule, the notice is required, either by statute or rule of court, to be in writing; but in the absence of such statute or rule, verbal notice will be sufficient, especially where notice is not denied.[3] And where a party verbally agreed with the opposite party to the suit upon the time and place of taking depositions, and a deposition was, in pursuance of such agreement, taken by one of the parties in the absence of the other, the party failing to attend was not permitted to repudiate the agreement, and object to the deposition upon the ground that he had not been notified of the taking thereof.[4] Where, however, the statute required the notice to be in writing, it was held, though the court might order a deposition to be taken during the trial, and upon such notice as to time as seemed reasonable, that, nevertheless, the written notice prescribed by statute could not be dispensed with.[5]

§ **1223. What to Contain.**— As to what the notice shall contain, no precise rule can be laid down which will be

[1] Ellis *v.* Jaszynsky, 5 Cal., 444; Garnett *v.* Yoe, 17 Ala., 74; Foster *v.* Smith, 2 Cold. (Tenn.), 474; Briggs *v.* Green, 33 Vt., 565.

[2] Perry *v.* Siter, 37 Mo., 273.

[3] Milton *v.* Rowland, 11 Ala., 732.

[4] Ormsby *v.* Town of Granby, 48 Vt., 44.

[5] Dunning *v.* Foster, 42 N. H., 165; Cater *v.* M'Daniel, 21 N. H., 231.

found universally applicable. The matter being regulated by statute, in some of the states the notice is required to contain a much fuller statement than in others. But there is probably no exception to the rule requiring the notice to indicate with reasonable certainty the time and place of taking the depositions, and also the particular actions in which the same are intended to be used.[1]

§ **1224. Deemed Sufficient.**— Where, however, the notice was to take the deposition on a given day, at an hour mentioned, "at the house of W P. (the witness), to be read in evidence in a case now pending in the superior court of law for the said county, wherein I am plaintiff and you are defendant," though the county in which said witness resided, and the suit was pending, was not mentioned, there being no evidence that there was any other "W. P.," or any other suit between the parties than the one on trial, the notice was held sufficient.[2]

§ **1225. Clerical Errors.**— So where there is a clerical error in writing the name of the place where the depositions are to be taken, if in the opinion of the court such mistake is not misleading, the deposition should be received.[3] Especially if there be other descriptive terms in the notice, less likely to be mistaken.[4] So also where the case was wrongly entitled, but not so as to mislead the opposite party's attorney, who knew the case intended by the notice, and knew the witnesses to be examined, and signified his intention to be present at the examination, the notice was held sufficient.[5]

§ **1226. Name of Officer.**— In general, it is unnecessary to mention the name of the officer before whom the deposition will be taken, except where the statute interposes this requirement;[6] but where the name of such officer is required,

[1] Kingsbury *v.* Smith, 13 N. H., 109.
[2] Owens *v.* Kinsey, 6 Jones, Law (N. C.), 38.
[3] Gibson *v.* Gibson, 20 Pa. St., 9.
[4] Pursell *v.* Long, 7 Jones, Law (N. C.), 102.
[5] Mathew *v.* Dare, 20 Md., 248.
[6] Patterson *v.* Hubbard, 30 Ill., 201.

or is given merely through an abundance of caution, a mistake in writing the name, as where it was rendered "Stormer" for "Stermer," it not appearing that there were two justices of those names in the county, the notice was held sufficient.[1] So where the Christian name of the commissioner was omitted in a notice of a rule for an extraterritorial commission, the depositions taken under such commission were held admissible, as there did not appear to be another commissioner of the same name in the place where the depositions were taken.[2] And where the name of the commissioner was erroneously substituted for that of the witness, the mistake was held immaterial, inasmuch as in all the other papers the names were correctly inserted, so that the opposite party could not be misled.[3]

§ **1227. Witnesses Need Not All be Named.**— Where the notice stated that the depositions of several witnesses — naming them — *and others*, were to be taken, and the witnesses named did not depose, but the evidence of *others* was taken at the time and place, this was held no good ground for excluding such depositions.[4] In fact, the names of the witnesses are not generally required to be inserted in the notice.[5] But in a case arising under a statute requiring the names of the witnesses to be given, a notice declaring an intention to take the depositions of such person or persons as were on a certain day, mentioned in the notice, acting tellers or cashiers of a certain designated bank, this notice was held not a sufficient identification of the witnesses to be examined.[6]

§ **1228. Conditional Notice Insufficient.**— Notice that a deposition in chancery proceedings will be taken *conditionally* has been held insufficient to authorize the receipt

[1] County of Green *v.* Bledsoe, 12 Ill., 267.
[2] Kellum *v.* Smith, 39 Pa. St., 241.
[3] Eastman *v.* Bennett, 6 Wis., 232.
[4] McDugald *v.* Smith, 11 Ired. (N. C.), 576.
[5] Heaton *v.* Findlay, 12 Pa. St., 304; Mumma *v.* McKee, 10 Iowa, 107.
[6] Pilmer *v.* Branch of State Bank, 16 Iowa, 321.

of such deposition in evidence. The intention to take the deposition should be expressed in absolute terms.[1]

§ **1229. Must be Signed.**— Another feature of the notice, which would only be neglected or omitted through carelessness or negligence, is the signature of the party or attorney by whom it is given. Of course, all that is requisite, where the notice comes directly from the party, is that it shall be signed with his usual signature.[2] When, however, the notice is given by the attorney, that fact should appear from the signature; but it is of slight importance what additions are made to the name of the person sending the notice, or what is omitted therefrom which might with propriety be added, so long as the notice is signed, and the party notified understands, from the signature, from whom or in whose interest the notice is given.[3]

§ **1230. Time of Taking.**— The notice should state the time of taking the depositions, with reasonable certainty, both as to the day and hour. It is the general practice, however, to fix the time between certain hours of the day, as *8 o'clock in the forenoon and 5 o'clock in the afternoon*, etc. This latitude as to hours seems necessary, in order that neither party may be taken entirely by surprise, and forestalled of his right to appear and examine any witnesses produced by the other; but as to the day of taking the deposition, less latitude is allowable or necessary. In general, the taking should be commenced on a day mentioned in the notice, though it may be continued through several days until finished.[4] And where the notice was that the depositions would be taken on the 15th, and if not finished on the 15th, then on the 16th, and so on to the 18th of the month, it was held that one taken pursuant to such notice on the 18th was properly admitted against the objections of the

[1] Crittenden *v.* Woodruff, 11 Ark., 82.
[2] Bohn *v.* Devlin, 28 Mo., 319.
[3] Clement *v.* Brooks, 13 N. H., 92.
[4] Phillips *v.* Bowen, 2 Pa. St., 20.

opposite party.[1] But where the notice was to take the deposition on the 20th and 21st, one taken on the 21st was rejected.[2] And where the notice in another case stated that the deposition would be taken on the 4th, 5th and 6th days of the month, it was held insufficient because of its indefinite statement of the time of taking.[3]

§ 1231. **Mistake in Date of Taking.**— Clerical mistakes in stating the day fixed for taking the deposition will be governed by the same liberal rule applied to other casual errors. So where the date fixed by the notice was "Monday the 26th," etc., and the deposition noticed was taken on the 26th, it was held properly admissible, though the 26th day of the month did not fall on Monday.[4]

§ 1232. **General Requisites.**— In general, a notice of the contemplated taking of depositions, which contains a clear statement of the day and hour of taking, the name of the city, town or village, and the house, office or room, designated by number or other certain description, where they are to be taken, together with the names of the parties between whom the suit is pending, will be found sufficient to entitle such depositions to be read in evidence.[5]

§ 1233. **Time of Service.**— An important matter to be considered, in determining whether a notice of this kind is sufficient, is whether it was served a sufficient time before the day appointed for the taking of depositions. This is, in many of the states, settled definitely by statute; and where a certain number of days are so prescribed, the deposition will not be admissible against the opposite party's objections, if the notice has been given for a shorter time.[6]

§ 1234. **Time Decided by Court.**— But all statutes regulating the taking of depositions are not so definite or spe-

[1] Thomas *v.* Davis, 7 B. Mon., 227.

[2] Jordan *v.* Hazard, 10 Ala., 221.

[3] Humphries *v.* McCraw, 9 Ark., 91.

[4] Rand *v.* Dodge, 17 N. H., 343.

[5] Bundy *v.* Hyde, 50 N. H., 116; Alexander *v.* Alexander, 5 Pa. St., 277.

[6] Travis *v.* Brown, 43 Pa. St., 9; Congdon *v.* Anderson, 30 Ill., 95.

cific. By the employment of general and rather indefinite terms, they throw upon the courts the responsibility of deciding, as a question of law, what is a sufficient time for a notice of this kind. As where the party proposing to take the deposition is required to give notice in a *reasonable* time, to enable the party notified to appear and procure the attendance of counsel,[1] the courts are compelled to determine what is a reasonable time, and in reaching a conclusion will be governed by the circumstances of each particular case.[2] Even less definite, if possible, is the term "due notice;" and when the statute is not more specific in prescribing the time for which notice is to be given, the determination is left entirely to the discretion of the court or the presiding judge thereof.[3]

§ 1235. Computation of Time and Distance.— And even where the time is prescribed by statute, it must necessarily be subject to variation, according to the distance of the party's residence from the place of taking the deposition.[4] This casts upon the court the duty of deciding between various routes of travel, by which the distance shall be reckoned. Accordingly, it was held in one case where the statute prescribed three days' notice, with an additional day for every twenty miles of travel between the place of service of the notice and the place of taking, that though by river, which was the most expeditious mode of travel between the two points, the distance was so great that the notice would be for too short a time, yet, as by the usual land route the time was sufficient to allow one day additional to each twenty miles, the notice was held sufficient.[5] Judicial construction has even been found necessary to determine what was meant by "ten days' notice." In one

[1] Kimpton *v.* Glover, 41 Vt., 283; Stephens *v.* Thompson, 28 Vt., 77; Phelps *v.* Hunt, 40 Conn., 97.

[2] Atwood *v.* Fricot, 17 Cal., 37.

[3] Harris *v.* Brown, 63 Me., 51.

[4] Porter *v.* Pillsbury, 36 Me., 278.

[5] Lindaur *v.* Mutual Safety Insurance Co., 13 Ark., 461.

case, it was held to mean notice *received*, instead of notice *sent*, ten days prior to the taking.[1] In another, it was held that notice on the 5th of the month, of what was to transpire on the 15th, was a sufficient compliance with the rule for ten days' notice; the time being computed by excluding either the first or the last day, which is the common method.[2] But where six days were required for thirty miles, notice served on the 21st, for taking on the 26th, was held insufficient.[3] Under a rule for taking depositions on twenty days' notice, it was very justly held that such rule could not apply to cases where, from the distance between the place of trial and the place of taking, it would be physically impossible to travel to and fro between the points within that time.[4] In the same case, it was held that forty-five days was sufficient time between San Francisco, California, and the state of New Hampshire.

§ 1236. Absence of Statute or Rule.— Where there is no statute or fixed rule allowing so many days for so many miles, the court will inquire more particularly as to the time necessary to travel the distance, by the customary routes and the usual modes of travel, than as to the number of miles composing the distance. Accordingly, it was decided that ten days were sufficient for a notice to take depositions, at a distance of fifteen hundred miles from the court, when it was shown that the entire distance could be traveled in six days.[5] So, where the usual mode of travel was by railroad, the court took judicial notice of that fact, and thirty-six hours being sufficient for the journey, eight days were held amply sufficient for the notice.[6] For the same reasons, it was held, in the same state, that nine days' notice of the taking of depositions in the city of New York would suffice

[1] Gooday *v.* Corlies, 1 Strob. (S. C.), 199.
[2] Arnold *v.* Nye, 23 Mich., 286.
[3] Richardson *v.* Burlington & M. R. R. R. Co., 8 Iowa, 260
[4] Gerrish *v.* Pike, 36 N. H., 510.
[5] Carlisle *v.* Tuttle, 30 Ala., 613.
[6] Hipes *v.* Cochran, 13 Ind., 175.

to entitle them to be read in evidence on a trial in the state of Indiana.[1]

§ 1237. Time Not Always Governed by Distance.— On the other hand, the mere fact that the distance is short will not always abbreviate the time required for notice, so that the *time* and *distance* will bear the same relation to each other as when the distance is longer. In fact, the distance between the two points is only to be considered with reference to its bearings upon the question of prime importance, whether the notice is given in time to enable the party notified to be present and procure the attendance of his counsel. For, however short the distance may be, if the notice is not given in time enough to afford the opposite party an opportunity to attend the taking of the deposition, it will be held insufficient.[2]

§ 1238. Time Not Fixed by Special Circumstances.— It is not intended to convey the idea that every case is to furnish its own rule, and be governed by the particular circumstances affecting the conduct of the parties. The time will not be lengthened or shortened to suit the mere convenience of the parties, nor will the interposition of unforeseen obstacles, by which the party notified is prevented from attending the taking, be considered as entitling him to further time, or as deciding what length of time was necessary in the particular case; and when a certain day and hour are mentioned in the notice, which as a rule would prove sufficient, the opposite party cannot claim any additional time, because the peculiar exigencies of his situation prevented his attendance.[3]

§ 1239. Except When Unusually Short.— Yet, when the time is very short, it usually requires an entire absence of impediments to render it sufficient. As, where the notice was served during the afternoon of Saturday, by leaving it in writing at the residence of the plaintiff, during his

[1] Manning *v.* Gasharie, 27 Ind., 399.
[2] Fant *v.* Miller, 17 Gratt. (Va.), 187.
[3] Morrill *v.* Moulton, 40 Vt., 242.

absence, with a member of his family, informing him that the deposition would be taken on the following Monday at the hour of 2 o'clock in the afternoon, and the plaintiff returned home on Saturday evening and received the notice, but could not attend without his attorney, who was engaged elsewhere, the deposition was suppressed on account of insufficient notice.[1] In another case, however, where the notice was served at 8 o'clock in the evening, of the taking of depositions at 8 o'clock on the morning of the next day, the parties both residing in the same city where the depositions were to be taken, and there appearing no special reason why they could not attend on the short notice given, it was held sufficient, though the court was in session at the time.[2]

§ **1240. Statutory Time May be Shortened.**— Under the California statute the service of a copy of an order of court, to appear and show cause why a commission should not issue, is sufficient notice, and if the time fixed by the order for the party to appear is less than that prescribed by statute for a notice, it is equivalent to an order shortening the time, which seems to be within the scope of the powers of the court.[3]

§ **1241. Objections to Time — When Taken.**— It is sometimes maintained that any objections to the deposition, on account of the shortness of the time, should be taken before the trial.[4] In any event they should be interposed before the deposition in question has been read in evidence. Where, however, the objections are raised by the attorney of the party at the taking of the deposition — he appearing for that purpose only, and refusing to cross-examine wit-

[1] Masters *v.* Warren, 27 Conn., 293.

[2] McGinnis *v.* Washington Hall Association, 12 Gratt., 602.

[3] Dambmann *v.* White, 48 Cal., 439. But an order abbreviating the statutory period must prescribe the time of notice. Howell *v.* Howell, 5 West Coast Rep., 286.

[4] Cornelius *v.* Partain, 39 Ala., 473.

nesses, there is no doubt but that the objections are timely, and if well taken, the deposition will be rejected.[1]

§ 1242. **Party Must Show Himself Entitled to Time.**— Before a motion to suppress a deposition on the ground of insufficient time can be sustained, the party objecting must show affirmatively that he was fairly entitled to the time of which he claims to have been wrongfully deprived.[2] Where there is an agreement between parties, or their counsel, to take depositions on shorter notice than that prescribed by statute, those taken in pursuance of such arrangement may be read in evidence as though they were taken upon notice for the statutory time. But whatever the agreement or understanding between the parties may be, in order to be effective, it must be faithfully carried out. It was accordingly held, where an agreement was entered into between counsel to take depositions on one day's notice, and there was a failure to give the notice for the time agreed upon to the proper party, that the testimony taken on behalf of one of the parties was properly ruled out on the trial.[3]

§ 1243. **Service of Notice.**— It is important to know in every instance that the notice was addressed to the proper party, and was properly served. This is one of those notices which may with peculiar propriety be served upon the attorney of record of the opposite party.[4] But when so served, it should be a sufficient time before the taking to give the attorney an opportunity to communicate with his client.[5] It has even been held that the notice might be served upon the attorney, after information received that he had retired from the case, and it would be sufficient to charge the opposite party with notice of the taking of the deposition;[6] but this cannot be regarded as justifying the

[1] Beasley *v.* Downey, 10 Ired., 284.
[2] Adams *v.* Peck, 4 Iowa, 551.
[3] Bohr *v.* Steamboat Baton Rouge, 7 Sm. & M., 715.
[4] Bailey *v.* Wright, 24 Ark., 73; Hunt *v.* Crane, 33 Miss., 669.
[5] Hunt *v.* Crane, 33 Miss., 669.
[6] Herrin *v.* Libbey, 36 Me., 350.

service of notice upon one, merely because of his antecedent engagement as attorney in the case, where he has not only retired, but had the fact of his retirement properly entered upon the records of the court. The only instance in which it would be proper to serve such a notice upon an attorney, after the cessation of his active connection with the suit, would be where he still remained the attorney of record, awaiting the substitution of another in his stead. It is not essential at all times that the attorney of record should be served. As where the notice of retainer and the answer were filed by one attorney, and the trial was conducted throughout by another, who had never been formally substituted as attorney of record, the notice was held properly served upon the latter.[1]

§ 1244. Insufficient Service.— Where the notice was served upon one, neither an attorney of record in the case, nor an adverse party, the deposition was held inadmissible.[2] Service upon the attorney is regarded as sufficient, only when there is no statute or rule of court requiring personal service upon the party. It was accordingly held, where the rules provided for service upon the attorney, except where the statute or "these rules" directed otherwise, and there was an old rule requiring the notice to be served upon the opposite party, that the notice served upon the attorney was insufficient.[3]

§ 1245. Upon Several Co-parties.— As to the manner of serving several co-parties, interested adversely to the party giving notice, the authorities are not in perfect accord, it being held that service upon one of such parties will be sufficient notice to all,[4] while, on the other hand, it has been decided that a deposition cannot be offered in evidence against one of two joint defendants who has not been noti-

[1] King *v.* Ritchie, 18 Wis., 554.

[2] Brown *v.* Ford, 52 Me., 479.

[3] Fleming *v.* Beck, 48 Pa. St., 309.

[4] Spaulding *v.* Ludlow, etc., Mill, 36 Vt., 150; Ellis *v.* Lull, 45 N. H., 419.

fied, merely because his co-defendant has been duly served with notice of the taking.[1] In the case of Spaulding *v.* Ludlow, etc., Mill,[2] the rule is declared with the qualification that good faith should be used in selecting the one to be served, so that the interests of all may be protected. The case of Ellis *v.* Lull[3] is decided under a statute expressly providing that service shall "be upon the opposite party, *or one of them.*" It may be held, where the adverse parties sustain toward each other relations of a peculiarly intimate character, as that of husband and wife, partnership, etc., that service upon one is equivalent to service upon both or all; but it is difficult to understand why the mere fact that several persons have been joined as parties defendant in the same suit should establish such a close connection between them that they are supposed to communicate to each other every fact in relation to the controversy coming to their knowledge. The depositions to be taken may be offered as evidence of facts of very little or no interest whatever, to the party notified, while the evidence thus produced would be fatal to the defense of the party who was left in ignorance of taking them. But when there has been a failure to notify one of several joint plaintiffs or defendants, it seems quite clear that he alone can urge such failure in support of an objection to the deposition when offered in evidence.[4]

§ 1246. Strict Personal Service Not Required.— Generally, notices of this kind do not require strict personal service, either upon the party or his attorney. Even where the statute has not prescribed the mode of service otherwise than by personal delivery, it is sometimes held, on the authority of analogous cases, that it may be properly served by leaving it with some one at the place of business or residence of the party or his attorney.[5] But where the statute

[1] McConnell *v.* Stettinius, 7 Ill., 707.

[2] *Supra*, § 1245.

[3] *Supra*, § 1245.

[4] Glenn *v.* Glenn, 17 Iowa, 498; *infra*, § 1249.

[5] Goodloe *v.* Bartlett, 5 McLean, 186; Prather *v.* Pritchard, 26 Ind., 65; Merrill *v.* Dawson, 1 Hemp., 563.

required that notice should be "served on the adverse party or his attorney, as either may be nearest," etc., it was held not to be a sufficient compliance to leave such notice at the usual place of abode of either, with any one other than the party or his attorney.[1]

§ 1247. Proof of Service.— The best evidence, and that, in fact, which is generally prescribed, either by statute or rule of court, of the service of notice, is the notice itself, or a properly authenticated copy thereof, attached to and inclosed with the deposition,[2] and the deposition must show upon its face that it was taken at the time and place mentioned in the notice.[3] Parol proof, however, of the service of notice has been held sufficient.[4]

§ 1248. Upon Attorneys in Partnership.— When the notice is addressed to attorneys-at-law by their firm name, they appearing by the record to be attorneys in the case, it is not necessary that the return on the notice, where it is served by the sheriff, should contain the statement that they are such attorneys, or that they were served in that capacity. And when the notice appears to have been delivered to a person bearing the same name as one of the partners, it will be sufficient. The court will take judicial notice that they are the attorneys of record, and it will be presumed that they were notified of the intention to take depositions in the capacity in which they filed the declaration. It will also be presumed that, in making the service, the officer did his duty, and consequently that the person served as a member of such firm was one of the partners.[5]

§ 1249. When Depositions to be Used in Two Cases.— Where notice was given of the intention to use the deposition to be taken, in two separate actions, pending at the same time in the same court, it was held sufficient to author-

[1] Carrington *v.* Stimson, 1 Curtis, Ct. Ct., 437.
[2] Carlton *v.* Patterson, 29 N. H., 580.
[3] Young *v.* Mackall, 4 Md., 362.
[4] Pickard *v.* Polhimus, 3 Mich., 185.
[5] Reese *v.* Beck, 24 Ala., 651.

ize the reading of the deposition in both suits;[1] but where there are different parties to the suits, though both are concerning the same subject-matter, the deposition will not be received in evidence against a party who has not been notified, and had an opportunity to be present and cross-examine the witnesses.[2] Where, however, the testimony is taken under a notice entitled in two actions, between the same parties, it will be presumed, in the absence of any showing to the contrary, that they were upon the same matter, and that no substantial rights have been affected by giving one notice of taking depositions for both cases.[3]

§ 1250. **Postponement by Consent.**— As important as is the observance of the day and hour indicated by the notice, the deposition may be taken on a subsequent day, or between other hours, when both parties appear, either in person or by attorney, at the time indicated, and consent to a postponement; but in order that the deposition may be admissible in evidence against objections from the opposite party, the certificate of the officer before whom it was taken, that the examination was postponed by consent, is necessary.[4]

§ 1251. **Effect of Acknowledgment of Service.**— Even where, by statute or rule of court, a certain time is fixed for the notice, such time may be abbreviated by consent of the parties or their counsel, by a written acknowledgment of due service indorsed upon the notice or interrogatories, or written upon a separate paper, which indicates with certainty the suit in which the deposition is to be used.[5] So, where the notice was sent by mail, addressed to the attorney of the opposite party, and in due time was returned bearing an admission of notice indorsed thereon, which was acted

[1] Scott *v.* Bullion Mining Co., 2 Nev., 81.

[2] Rutherford *v.* Geddes, 4 Wall., 220.

[3] Laithe *v.* McDonald, 7 Kan., 254.

[4] Lewin *v.* Dille, 17 Mo., 64.

[5] Cherry *v.* Baker, 17 Md., 75; Scott *v.* Scott, id., 78; Atwood *v.* Fricot, 17 Cal., 37; Moore *v.* Gammel, 13 Tex., 120.

upon under the belief that it was signed by authority of the attorney, it was held that a motion to suppress the deposition for the want of notice, it appearing that the attorney was absent on receipt of the notice, and the same was acknowledged by his son and law partner, was properly overruled by the trial court.[1]

§ **1252. Alteration of Notice.**— The deposition may be open to objection on account of alterations made in the notice after service; but where an alteration appears on the face of the notice attached to the deposition, it will not be presumed to have been made after service.[2]

§ **1253. Objections Waived.**— All objections, however, to the notice for insufficiency of statement, defective service, or even the entire absence of notice, may be waived by the party entitled thereto, by appearance in person or by attorney, at the taking of the deposition, and cross-examination of the witnesses, without raising the objection then and there.[3] In any event, the objection that no notice was served, cannot be raised for the first time in the appellate court.[4] So, the filing of cross-interrogatories, without objection, has been held to be a waiver of objections to the notice, on account of irregularities, whether relating to its contents or manner of service.[5]

§ **1254. Waiver by Presence.**— The mere presence of the party or his attorney, at the taking of the deposition, seems in some instances to have been taken as a sufficient waiver of the objection that notice was entirely wanting.[6]

[1] Brown *v.* Clement, 68 Ill., 192.

[2] Davis *v.* Davis, 48 Vt., 502.

[3] Aicardi *v.* Strang, 38 Ala., 326; County of Greene *v.* Bledsoe, 12 Ill., 267; McCormack *v.* Irwin, 35 Pa. St., 111; Nevan *v.* Roup, 8 Iowa, 207; Jones *v.* Love, 9 Cal., 68; Doe *v.* Brown, 8 Blackf., 443; Caldwell *v.* McVicar, 9 Ark., 418.

[4] Dill *v.* Camp, 22 Ala., 249.

[5] Aicardi *v.* Strang, 38 Ala., 326.

[6] Milton *v.* Rowland, 11 Ala., 732; State *v.* Bassett, 33 N. J. L., 26; Crooker *v.* Appleton, 25 Me., 131; Pres't, etc., of Connersville *v.* Woodleigh, 7 Blackf., 102.

Where the appearance of the party, against whom the deposition is to be used, is certified to by the officer in such a manner as to leave no doubt that he was present, acquiescing in the taking of the same, this would probably be regarded as sufficient evidence of a waiver; but where his presence is noticed in the certificate, in connection with the further fact that he refuses to recognize the validity of the examination, by word or deed, such appearance can hardly be construed into a waiver of objections to antecedent irregularities.

§ **1255. May be Present Without Waiver.**— Even where the attorney appearing for the party entitled to notice cross-examines the witnesses produced by his adversary, this of itself will not amount to a waiver of the objection that notice was not given a sufficient time before taking the deposition, when the attorney appearing does so under protest and with an express reservation of the right of his client to object to the deposition at the trial, for the want of notice. The time given is not intended alone, for going and coming between the residence of the party notified and the place of caption, but for consultation and preparation. The party is not obliged to forbear attending the examination. It is impossible for him to say whether the deposition will be admitted or not, against his objection. It may turn out, during the taking of the deposition, that notwithstanding the shortness of the notice, it is sufficient to enable him to cross-examine intelligently, so that he may not desire to object. But having reserved his rights, by a formal objection to the taking of the deposition, he forfeits none of them by remaining during the examination, and even cross-examining the witnesses.[1]

§ **1256. Effect of Adjournment Without Consent.**— It was held in a case where the party notified was present with his attorney at the hour named in the notice, and waited until he was informed by the officer that the hour had ex-

[1] Hunt *v.* Lowell, etc., Co., 1 Allen, 343.

pired, when he discharged his attorney and retired, the sender of the notice having telegraphed for an adjournment to a later hour, and, arriving after the adjournment, notified the opposite party of the hour to which the taking was adjourned, that such party failing and refusing to appear in recognition of the validity of the second notice, might object to the admission of the deposition at the trial, and such objection would be sustained.[1]

[1] Hennessey *v.* Stewart, 31 Vt., 486.

VI. Notice to Produce Books and Papers.

§ 1257. General Remarks.
1258. Necessary to the Admission of Secondary Evidence.
1259. Demand Before Suit Not Sufficient.
1260. Necessary When Paper Recorded.
1261. Rule Same in Criminal Prosecution.
1262. Exceptions.
1263. In Action of Trover — Unnecessary.
1264. *Assumpsit* — Unnecessary.
1265. Debt on Bond — Unnecessary
1266. Action of Covenant — Unnecessary.
1267. Against Constable for Failing to Make Return — Unnecessary.
1268. Papers Filed, or Mentioned in Pleadings.
1269. Papers in Court.
1270. Paper Must be Traced to Opposite Party.
1271. Proof of Possession from Circumstances.
1272. Papers Under Control of Adversary.
1273. Privity Must be Clearly Established.
1274. Paper Passed Out of Party's Possession.
1275. May Impeach Copy.
1276. Not by Introduction of Original.
1277. Secondary Evidence, Even When Possession Disproved.
1278. Must be Proved When Produced.
1279. Need Not be Offered When Produced.
1280. Inference Drawn from Failure to Produce.
1281. Notice to Produce Notice — Unnecessary.
1282. Contents of Notice.
1283. Should Not be Too General.
1284. Generally in Writing.
1285. Renewal Unnecessary in Case of Continuance.
1286. Time of Notice.
1287. Served at Trial, Too Late.
1288. Party Not Required to Incur Expense.
1289. Original Not in Existence.
1290. Opposite Attorney in Possession of Paper.
1291. One of Several Joint Parties.
1292. Personal Service Not Indispensable.

§ 1257. **General Remarks.**— When a fact to be established on the trial is evidenced by a written or printed document, whether it be a book, memorandum of agreement, promissory note or specialty, the rule requiring the best at-

tainable evidence of the matter in issue is applied, and the original of the writing must be offered if obtainable. It is in general only when the original is beyond the reach of the party offering the evidence, that a copy, or parol testimony of its contents, may be substituted for the highest grade of evidence.[1] It is not alone the loss or destruction of the document that will place it beyond the reach of the party desiring to offer it. The opposite party may have it in his possession, in which event a notice to him to produce the instrument at the trial will have the effect to bring it to light, or, failing in this, will entitle the party calling for the document to introduce secondary evidence of its contents.[2]

§ 1258. Necessary to the Admission of Secondary Evidence.— Generally, secondary evidence of the contents of books and papers in the hands of the opposite party cannot be given, without reasonable notice to produce the originals. As where, in an action on account, defendant offered in evidence a receipt, which plaintiff testified was originally attached to a letter, a sworn copy of which he offered in evidence without a previous notice to produce the original, it was held error to receive such secondary evidence.[3] So where suit was brought upon an agreement, the written memorandum of which was in the hands of the other party, a copy of such agreement was held incompetent to prove its contents without a previous notice to produce the original.[4] So, also, in case of a lost letter written by the oppo-

[1] United States *v.* Winchester, 2 McLean, 135; Potier *v.* Barclay, 15 Ala., 439; Anderson Bridge Co. *v.* Applegate, 13 Ind., 339; Williams *v.* Benton, 12 La. An., 91; Farmers' & Merchants' Bank *v.* Lonergan, 21 Mo., 46; Grimes *v.* Fall, 15 Cal., 63; Commonwealth *v.* Emery, 2 Gray, 80; Foster *v.* Newbrough, 58 N. Y., 481; Carland *v.* Cunningham, 37 Pa. St., 228; Marlow *v.* Marlow, 77 Ill., 633.

[2] Bronson *v.* Kensey, 3 McLean, 180; Auger, Steel, etc., Co. *v.* Whittier, 117 Mass., 451; Anon., 1 Nott & McCord, 604; McKillip *v.* McIlhenny, 4 Watts, 317; Cates *v.* Winter, 3 T. R., 306; United States *v.* Winchester, 2 McLean, 135; Harris *v.* Whitcomb, 4 Gray, 433; Anderson *v.* Applegate, 13 Ind., 339; Marlow *v.* Marlow, 77 Ill., 633.

[3] Milliken *v.* Barr, 7 Pa. St., 23; Foster *v.* Newbrough, 58 N. Y., 481.

[4] Carland *v.* Cunningham, 37 Pa. St., 228.

site party, it was held incumbent upon the party seeking to prove its contents, to give notice to the writer to produce his letter book, supposing the letter to be a duplicate original.[1]

§ 1259. **Demand Before Suit Not Sufficient.**—A demand made before suit, upon the party in possession of the document, which the party making demand wishes to offer in evidence, will not be treated as equivalent to a notice to produce, even where the refusal to furnish it is the immediate cause of the suit, except where the action is for the conversion of an instrument of some value and the pleadings allege that it is in the possession of the defendant.[2]

§ 1260. **Necessary When Paper Recorded.**— Neither will the mere fact that the paper has been recorded excuse notice to produce, so as to admit secondary evidence of its contents, in the first instance, where the record has been destroyed.[3] However, the general rule as to notice to produce would not apply to recorded instruments, where, upon proper preliminary proof that the party had made due search and inquiry, and was unable to produce the original, he is permitted to use a certified copy instead.[4]

§ 1261. **Rule Same in Criminal Prosecution.**— But the rule is applicable to criminal prosecutions, substantially the same as to civil cases; though a different view of the law seems to have obtained with the court in the decision of one case.[5] There it was held that notice to produce was not necessary, in order to introduce a copy of the original paper, when such original was in the hands of the accused, and would be offered by the state against him; the reason assigned for this holding was that *there was no power in the court to compel the accused to produce a paper which might be evidence against himself.* The best considered cases, how-

[1] Dennis *v.* Barber, 6 Serg. & R., 420.
[2] Muller *v.* Hoyt, 14 Tex., 49; Lathrop *v.* Mitchell, 47 Ga., 610.
[3] Murchison *v.* McLeod, 2 Jones (N. C.) L., 239.
[4] Bowman *v.* Wettig, 39 Ill., 416.
[5] State *v.* Gurnee, 14 Kan., 111.

ever, do not rest the rule upon the power of the court to enforce obedience to the notice. The mere service of a notice by the opposite party does not ordinarily render a litigant subject to the compulsory process of the court, as though he had disobeyed a subpœna. The notice required is not provided as a means of compelling the production of books and papers in cases of either civil or criminal cognizance.[1] Its purpose seems to be to *enable* the party notified, at his option, to produce the best evidence of the matter in dispute, or to submit to having it decided against him upon evidence secondary in its character, and which may be discolored to his prejudice. The application of this rule to criminal cases is advantageous, rather than otherwise, to the accused. It was accordingly held, where defendant was accused of forging a draft, and he was not notified to produce the same, that secondary evidence of its contents was inadmissible.[2]

§ **1262. Exceptions.**— Where, however, the prosecution is for the theft of the instrument, or for otherwise obtaining unlawful possession thereof, notice to produce is not necessary in order to pave the way for the introduction of secondary evidence, offered to prove the identity or value of the stolen instrument, or for any other purpose material to the issue.[3] But the reason for the exception in such cases is not that the court forbears to compel the accused to produce documentary evidence against himself, but is because the nature of the prosecution informs the defendant sufficiently that the facts which can be best proved by the production of the paper in question will be offered in evidence against him.[4] So far from being decided on the ground of exemp-

[1] Milliken *v.* Barr, 7 Pa. St., 23; Greenleaf on Ev., § 560; 2 Tidd's Pr., 802.

[2] The Queen *v.* Elsworthy, 1 Cr. Cas., 103; Le Marchand's Case, 1 Leach Cr. Cas., 336, note *a;* Layer's Case, id.; Rex *v.* Haworth, 4 Carr. & Payne, 254; Commonwealth *v.* Goldstein, 114 Mass., 272.

[3] Com. *v.* Essinger, 1 Binney (Pa.), 273; McGinnis *v.* State, 24 Ind., 500. See, also, Pendleton *v.* Com., 4 Leigh (Va.), 694; Aickles' Case, 1 Leach Cr. Cas., 330.

[4] See cases cited *supra.*

tion from self-criminating testimony, those cases are so decided in pursuance of a principle common to cases of both civil and criminal cognizance. That where, from the nature of the action or prosecution, the defendant is apprised of plaintiff's intention to charge him with the possession of a certain writing, or where the declaration or indictment gives him notice to be prepared to produce a particular instrument, if necessary to contradict plaintiff's evidence, no further notice to produce need be given before secondary evidence may be received.[1]

§ **1263. In Action of Trover — Unnecessary.**— Where the action was trover for a bond, alleged to be in the possession of defendant, plaintiff was allowed to give parol evidence of its contents to prove a general description, without giving notice to produce the original, for the reason that sufficient notice was given by the nature of the action.[2]

§ **1264. Assumpsit — Unnecessary.**— So, also, in *assumpsit* against the proprietor of a stage-coach, in whose possession certain promissory notes were alleged to have been last seen, upon his implied promise to carry such notes, secondary evidence, descriptive of the notes, was admitted in the absence of any notice to produce.[3]

§ **1265. Debt on Bond — Unnecessary.**— And where in an action of debt on a bond given by defendants, one of whom was a collector, to a former treasurer, conditioned that such collector "should well and truly collect all the taxes assessed," etc., and pay the same over to the treasurer, it was denied at the trial that the warrant for the collection of

[1] Howell *v.* Huyck, 2 Abb. App. Dec. (N. Y.), 423; People *v.* Holbrook, 13 Johns., 90; 2 Phil. on Ev., 539 (Cow. & H. & Ed. notes); State *v.* Mayberry, 48 Me., 218; Nealley *v.* Greenough, 25 N. H., 325.

[2] Howe *v.* Hall, 14 East, 274; Scott *v.* Jones, 4 Taunt., 865; Hays *v.* Riddle, 1 Sandf., 248; McClean *v.* Hertzog, 6 Serg. & R., 154; Rose *v.* Lewis, 10 Mich., 483; Ross *v.* Bruce, 1 Day, 100.

[3] Jolley *v.* Taylor, 1 Camp., 143. And where the same form of action was brought to recover the amount of an attorney's bill, it was held that an unsigned copy might be read in evidence to prove the contents of the original delivered to defendant. Colling *v.* Treweek, 6 B. & C., 394. This seems extending the doctrine of the text a great way.

taxes referred to the tax list, and also that the list was signed by the assessor, as required by law. The court held that, as the papers were in the hands of the defendant, and these were proper matters of defense, the defendant must have understood from the issues raised by the pleadings that they would come in question, so no notice was necessary.[1]

§ 1266. Action of Covenant — Unnecessary.— So in an action of covenant, where the pleadings allege the possession of promissory notes or other papers essential to be used on the trial, notice to produce them is unnecessary.[2]

§ 1267. Against Constable for Failing to Make Return — Unnecessary.— It has also been held that in a proceeding before a justice of the peace, against a constable for failing to return an execution, parol evidence of the contents of the execution should be admitted without previous notice to the constable to produce the original.[3]

§ 1268. Papers Filed, or Mentioned in Pleadings.— Where defendant in ejectment filed in the case a copy of a title bond, it was presumed that the original was in his possession, and in court, and on his failing to produce it, the court decided that plaintiff might read the copy in evidence without notice to produce the original.[4] But where the bill of particulars contained an item, "draft on J. A.," this was held not sufficient to dispense with notice to produce such draft, and permit defendant to offer secondary evidence of its contents, when the plea did not apprise plaintiff that he was charged with its possession.[5] But when, from the nature of the action, the defendant has notice that he is charged with the possession of the document, notice will be unnecessary.[6]

[1] Kellar *v.* Savage, 20 Me., 199. See First National Bank *v.* Priest, 50 Ill., 321, and compare with Weaver *v.* Crocker, 49 Ill., 461.

[2] Hardin *v.* Kretsinger, 17 Johns., 293; Hammond *v.* Hopping, 13 Wend., 505; Dana *v.* Conant, 30 Vt., 246.

[3] Hart *v.* Robinet, 5 Mo., 11.

[4] Griffin *v.* Sheffield, 38 Miss., 359.

[5] Dean *v.* Border, 15 Tex., 298.

[6] Howell *v.* Huyck, 2 Abb. App. Dec. (N. Y.), 423.

§ **1269. Papers in Court.**— So it was held, where the papers to be offered in evidence were in court, that the party having them in possession might be required to deliver them to the opposite party on demand, without any previous notice to produce, and if not delivered, secondary evidence would be admissible.[1] The object of this notice is not, as has been supposed in some instances, to enable the party notified to prepare counter evidence with which to rebut that which is produced in response to the notice, for neither party is required to inform his adversary of the evidence by which he proposes to prove his case. Notice is required for the purpose of giving the party notified sufficient time to produce the paper if he will.[2]

§ **1270. Paper Must be Traced to Opposite Party.**— After the notice has been duly served and the original document is not forthcoming, before secondary evidence can be offered it becomes necessary to trace the original into the hands of the opposite party or under his control; but slight evidence of such possession or control will generally be sufficient.[3] As where the document called for was a written contract, and there was evidence tending to prove that it was delivered by plaintiff's broker to his clerk, to be sent, in the regular course of business, to defendant's broker, and the clerk could not say positively that he had sent it, but testified that if it came to his hands he had sent it to defendant's broker, this was held sufficient evidence of the defendant's possession of the writing to warrant the introduction of secondary evidence of its contents, in the absence of the original, after due notice to produce.[4]

§ **1271. Proof of Possession from Circumstances.**— So where the defendant desired to prove the contents of a deed, shown to have been in possession of plaintiff's father

[1] Boatright *v.* Porter, 32 Ga., 130; Dana *v.* Boyd, 2 J. J. Marsh., 587; 2 Tidd's Prac., 804.

[2] See *post*, § 1286.

[3] 1 Wharton on Ev., § 154, and cases cited in note 6.

[4] Robb *v.* Starkey, 2 Carr. & Kir., 143.

during his life-time, and, since the death of the father, plaintiff had always had free access to the papers left by the deceased; after a notice duly served upon the plaintiff to produce the deed, and failure either to produce the same or satisfactorily account for its absence, secondary evidence of its contents was admitted.[1]

§ 1272. Papers Under Control of Adversary.— It is not absolutely necessary to trace the paper to the possession of the opposite party in order to give full effect to a notice to produce the same. It is sufficient to show such privity between the opposite party to the suit and the one shown to have possession of the document. As where the action was against the owner of a vessel, and the writing is traced to the possession of the captain;[2] or where the person in possession had a pecuniary interest in, though he was not a party to the suit;[3] or where the action was against joint owners, and the proof was that a bill had been rendered to one of them, and last seen in his possession;[4] in either of these, or similar cases, secondary evidence would be admissible upon a failure to produce the original at the trial, after notice. The rule will apply in the same manner where the paper called for is in the possession of the opposite attorney; and he may be required, in civil cases, to answer under oath, whether he has the paper in court.[5] And though an attorney may not be compelled to surrender a paper intrusted to him by his client in confidence, still he may be required to testify as to its existence, in order to lay a foundation for secondary evidence by proving the sufficiency of the notice.[6] And even where it is in the hands of a third person, who is outside the jurisdiction of the court, this circumstance alone will not be sufficient either to ex-

[1] Jackson *v.* Woolsey, 11 Johns., 446.
[2] Baldney *v.* Ritchie, 1 Stark., 338.
[3] Norton *v.* Heywood, 20 Me., 359.
[4] King *v.* Lowry, 20 Barb., 532.
[5] Morgan *v.* Jones, 24 Ga., 155.
[6] Brandt *v.* Klein, 17 Johns., 335; Morgan *v.* Jones, 24 Ga., 155.

cuse notice or to exclude secondary evidence after notice to produce, which is reasonable under all the circumstances.[1]

§ 1273. **Privity Must be Clearly Established.**— Where the books or papers are in the hands of any one other than the opposite party himself, the privity between the two must be clearly made out before a notice to produce will warrant the introduction of evidence of an inferior degree. As, where a mortgagee of a vessel is sued jointly with several of the owners, for supplies, notice to him to produce books and papers in the possession of the ship's husband will not authorize secondary evidence of their contents.[2] So, in an action of trespass for false imprisonment, where the paper was shown to be in the hands of the person under whom defendant justified, it was held that there was not such privity between him and defendant that notice to the latter to produce the paper would let in secondary evidence of its contents.[3] And where the paper is in the possession of one who occupies the position of a stakeholder between the party notified and another, notice to produce will not be available.[4]

§ 1274. **Paper Passed Out of Party's Possession.**— The party notified may give evidence that the document has lawfully passed out of his possession, and it will then devolve upon the court to determine whether secondary evidence is admissible.[5]

§ 1275. **May Impeach Copy.**— The party notified, who fails or refuses to produce the original, is not thereby precluded from disputing the correctness of the copy.[6] In the case cited, where this was so held, Campbell, C. J., in rendering the opinion of the court, said: "The refusal of a

[1] Shepard *v.* Giddings, 22 Conn., 282.

[2] Birbeck *v.* Tucker, 2 Hall (N. Y. City), 121.

[3] Evans *v.* Sweet, Ry. & M., 83.

[4] Parry *v.* May, 1 Mood. & Rob., 279.

[5] Harvey *v.* Mitchell, 2 Mood. & Rob., 366; Best *v.* Osborn, 1 Carr. & P., 632.

[6] Moulton *v.* Mason, 21 Mich., 364.

party, after reasonable notice, to produce a document in his possession, which the adverse party is entitled to introduce in evidence, * * * does not dispense with such proof as is attainable, and does not allow the tenor of the instrument to be made out by anything less than satisfactory evidence of all that is essential. There is no rule which prevents the contradiction of such secondary evidence, or which will allow a document to be conclusively proved by anything that a party may see fit to affirm to be a copy. Dispensing with primary evidence only changes the degree of evidence required, but in no way allows a case to be made out without proof, or prevents counter proof."[1]

§ 1276. **Not by Introduction of Original.**— But though the party served with notice is at liberty to controvert the secondary evidence offered in substitution for the original writing which he withholds, he will not be permitted to introduce the original in furtherance of that object. Having refused to furnish the document when called for, he cannot afterwards offer it in his own behalf.[2]

§ 1277. **Secondary Evidence, Even When Possession Disproved.**— Although the party may show that he was not in possession of the paper, when served, as a reason why his failure to produce it should not open the way for evidence of an inferior degree, yet so intolerant are the courts, of duplicity, that it has been held where he did not deny possession of the writing when served with notice, nor disclose its whereabouts when known to him, that secondary evidence would be admitted, though on the trial he denied possession of the paper.[3]

§ 1278. **Must be Proved When Produced.**— Where the original paper is produced in response to the notice, it would seem that this was a sufficient admission by the party pro-

[1] But it will not be necessary to call subscribing witnesses to prove the execution of an instrument, the contents of which are proved by secondary evidence. Cook *v.* Transwell, 2 Moore, R., 513.

[2] Doon *v.* Donaher, 113 Mass., 151.

[3] Sinclair *v.* Stevenson, 1 Carr. & P., 582.

ducing it, of its identity with the instrument called for; but should its execution or genuineness be disputed by the party from whose possession it is thus taken, it should be proved as any other piece of documentary evidence,[1] except where it is an instrument under which the party holding it claims a beneficial estate.[2] Were the rule otherwise, one who happened to be in possession of a spurious document, which, in the hands of another, might be used to his prejudice in a legal proceeding, instead of enjoying any degree of security from the possession of the dangerous instrument, would be more seriously embarrassed than if the writing were in the hands of his adversary. Should he receive notice to produce it, a failure to comply would open the way for a copy or parol evidence of its contents, which he would have no means of successfully controverting. Should he produce the instrument and be ruled to silence as to its genuineness, his case would be equally desperate.

§ **1279. Need Not be Offered When Produced.**— The notice to produce may be merely a tentative proceeding on the part of the party giving it, and when the paper is produced its recitals may be found so at variance with what was anticipated that he may not desire to offer it in evidence. This he cannot be forced to do, but neither can he, at his option, refuse to offer the original, and substitute secondary evidence therefor. As, when the original produced by defendant on notice, on inspection proved to be at variance with a copy in the hands of plaintiff, which he offered in evidence instead of the original, upon the ground that what purported to be the original instrument was spurious, it was held properly refused, as a paper was in court which was at least *prima facie* the original.[3] In this case the court reserved its decision as to how far plaintiff would have been permitted to show a variance of the defendant's paper from the genuine, after it was once introduced; but

[1] Rhodes *v.* Selin, 4 Wash. C. Ct., 715.

[2] Pearce *v.* Hooper, 3 Taunt., 60; Burnett *v.* Lynch, 5 Barn. & Cres., 28.

[3] Stitt *v.* Huidekopers, 17 Wall., 384.

it would certainly seem that if he was compelled to call upon the defendant to furnish the instrument, without a previous opportunity to examine it, he should not be conclusively bound by any paper the defendant might be pleased to produce. To decline offering the paper would be to abandon the point depending for proof upon such evidence. To hold him precluded from disputing the genuineness of the document when offered would be virtually to place the party calling for the writing entirely in the power of the party producing it.

§ 1280. Inference Drawn from Failure to Produce.— We have seen that the failure to produce an original instrument on the trial does not dispense with proof, but merely admits evidence of an inferior degree.[1] However, when a paper having an important bearing upon the matter in issue is traced to the possession of one of the parties, who, when challenged by his adversary to produce it, declines to do so, the jury are at liberty to infer from his refusal that the instrument would be damaging to his case.[2] At least, when books and papers are satisfactorily shown to be in the possession of a party to an action, which he fails or refuses, upon due notice from the opposite party, to produce at the trial, and the secondary evidence offered in lieu thereof is vague or uncertain, every presumption should be against the party who might have rendered it clear by producing the best evidence.[3] As in the case of Eastman *v.* Amoskeag, etc., Co.,[4] the paper called for by the notice was a receipt, and not being produced, a copy was offered in evidence, which was sworn to by a witness, who did not pretend to have compared it with the original, nor could he recollect

[1] *Ante*, § 1275.

[2] Kellar *v.* Savage, 20 Me., 199; Clifton *v.* United States, 4 How., 242.

[3] Eastman *v.* Amoskeag Manuf. Co., 44 N. H., 143; Foye *v.* Leighton, 24 id., 29; Cross *v.* Bell, 34 N. H., 82; Bassett *v.* Salisbury Co., 28 id., 438; Life & Fire Ins. Co. *v.* Mechanics' Ins. Co., 7 Wend., 31; Bright *v.* Young, 15 Ala., 112.

[4] *Supra.*

the contents of the original, without refreshing his memory from the copy, yet aided by the presumption stated above, this was held competent to go to the jury to prove the contents of the instrument withheld.

§ 1281. **Notice to Produce Notice — Unnecessary.**—The weight of authority in the United States is decidedly in favor of the doctrine that the contents of a notice, whether it be a notice to produce or for any other purpose, may be proved by secondary evidence, without a notice to produce the original. As, for example, a notice of demand and non-payment, or non-acceptance of commercial paper.[1] The ground for these decisions is that to hold otherwise would necessitate, for every notice sent, a new one to show the contents of the former, and so on *ad infinitum*.[2] It has also been held, in strict harmony with the other cases cited, that the contents of a notice by a surety to the holder of commercial paper, to sue the principal maker, may be proven by parol, without a notice to the holder to produce the original notice served upon him.[3] But in a more recent case, the court decided that in order to prove the contents of a written notice to sue, by the indorser to the holder, there should be a notice to produce.[4]

§ 1282. **Contents of Notice.**— The notice should contain a plain and concise statement of what is called for. The case should be properly entitled; but where the suit is brought in the name of one party to the use of another, and the notice is given by the attorney of one party and served upon the attorney of the other, describing the suit as between the nominal plaintiff and the defendant, this will be regarded as sufficiently certain.[5] If the notice is

[1] Central Bank *v.* Allen, 16 Me., 41; Eagle Bank *v.* Chapin, 3 Pick., 180; Leavitt *v.* Simes, 3 N. H., 14.

[2] Morrow *v.* Commonwealth, 48 Pa. St., 305; Eisenhart *v.* Slaymaker, 14 S. & R., 153.

[3] Christy *v.* Horne, 24 Mo., 242.

[4] Lathrop *v.* Mitchell, 47 Ga., 610. See, also, 2 Tidd's Pr., 805; cases cited, note *c*.

[5] Simington *v.* Kent, 8 Ala., 691.

sufficiently certain to avoid misleading the opposite party, it will be held good though it be inartificially drawn.[1] As where the descriptive part of the notice was in these words: "An agreement bearing date the 12th of December, 1855, made between the plaintiff and the defendant, whereby the defendant agreed to let, and the plaintiff to take, the house and premises No. 2," etc. (describing them), it was held sufficient.[2] So where the papers designated were—"All and every letters written by the said plaintiff to the said defendant, relating to the matters in dispute in this action," the description was held sufficiently certain, because it mentioned the writer and the person to whom written.[3] And even where a particular paper was desired, which was among certain accounts, and the notice called for "all accounts relating to the matters in question in this cause," it was held sufficient, because enough was expressed, under the peculiar circumstances of the case, to leave no doubt that the particular instrument would be called for.[4]

§ 1283. Should Not be Too General.—But the notice should not be so general as to leave any room for a reasonable doubt as to what books or papers are required; or to necessitate the production of an unreasonable number of documents in the possession of the party notified; or to place his private correspondence at the disposal of the party giving the notice, so as to enable him to inspect that portion which is utterly irrelevant, in order to determine what will answer his purpose. It was accordingly held that a notice calling for "all papers and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," was too general.[5]

§ 1284. Generally in Writing.—In general, the notice is required to be in writing; but even where this rule was ex-

[1] Justice *v.* Elstob, 1 Fost. & F., 256.
[2] Graham *v.* Oldis, 1 Fost. & F., 262.
[3] Jacob *v.* Lee, 2 Mood. & Rob., 33.
[4] Rogers *v.* Custance, 2 Mood. & Rob., 179; Morris *v.* Hauser, id., 392.
[5] France *v.* Lucy, Ry. & M., 341.

pressly recognized as in force, it was held not to apply when the notice was given in the presence and hearing of the court.[1]

§ 1285. **Renewal Unnecessary in Case of Continuance.**— The notice being to produce documentary evidence *at the trial*, it will hold good though the case should not be called at the next succeeding term, or should be continued or passed until the following year.[2] So where the party was notified to produce an instrument to be offered in evidence at the trial before a justice of the peace, and failing to produce it, secondary evidence was offered, it was held that the same notice would be available for the trial on appeal, and if the instrument was not produced there, evidence of an inferior degree would be admitted.[3]

§ 1286. **Time of Notice.**— A reasonable time must elapse between the service of the notice and the trial, to allow the party to procure the writing. What is reasonable time must necessarily depend upon the circumstances of each case. As where the service was at noon of the day preceding the trial, it was regarded as reasonable in point of time, and where the situation of the party was such as to have enabled him to attend the trial with the document, without serious inconvenience.[4] And when the notice was to produce the book of accounts of the party, in consideration of the fact that his counting-house was very near, it was held sufficient if served on the evening preceding the trial.[5] So where it was proved that at half-past six on the evening preceding the trial, plaintiff's attorney caused notice to produce a letter previously written to defendant, to be served on defendant at his residence by leaving it with his wife, and that he caused a similar notice to be served at the office of defendant's attorney a few minutes later in the evening,

[1] Kerr *v.* McGuire, 28 N. Y., 446.
[2] Reab *v.* Moor, 19 Johns., 337.
[3] Reab *v.* Moor, *supra.*
[4] Regina *v.* Hankins, 2 Carr. & Kir., 822.
[5] Shreve *v.* Dulany, 1 Cranch C. Ct., 499.

this was held not too late.[1] So, also, a notice given to the attorney several days before the trial, was held served within a reasonable time, although the party himself resided outside of the state.[2] It was also held, where the notice was served on the day preceding the trial, and it appeared that the paper was in the hands of a party residing at a distance of eighty miles from the place of trial, that the court would not take judicial notice of the fact that he could not have procured it, and in the absence of any showing of his inability to do so, secondary evidence of its contents was admissible.[3]

§ 1287. Served at Trial Too Late.— The notice will be regarded as too late when served at the time of trial, except where it can be shown that the books or papers are in court, or are of easy access.[4] So, where it was to produce a letter in reference to the note upon which suit was brought, and the service was at a quarter before 9 o'clock on the evening before trial, it was held too late.[5] So, also, where the notice was served at half-past 8 on one evening, and the trial was set for the hour of 10 on the following morning, it was held not served in time to require the production of the paper, nor to warrant secondary evidence when the original was not produced.[6]

§ 1288. Party Not Required to Incur Expense.— Where the notice was given on Saturday, to produce certain deeds, plaintiff's attorney went to town and procured them, and on the evening of the following Monday was served with another notice to produce an additional deed, which he said would be there in time for the trial, if defendant would bear the expense of sending for it. This, however, defendant did not do, but at the trial, on the fol-

[1] Meyrick *v.* Woods, Carr. & Marsh., 452.
[2] Jefford *v.* Ringgold, 6 Ala., 544.
[3] Cady *v.* Hough, 20 Ill., 43.
[4] Atwell *v.* Miller, 6 Md., 10; Barton *v.* Kane, 17 Wis., 37.
[5] Holt *v.* Miers, 9 Carr. & P., 191.
[6] Lawrence *v.* Clark, 14 Mees. & Wels., 250.

lowing Thursday, offered parol testimony of the contents of the deed, which the court refused to admit, and it was held, on appeal, that such refusal was proper, as it was unreasonable for plaintiff to repeat his journey to town at his own expense.[1]

§ **1289. Original Not in Existence.**— Objections on account of lateness of service will not be sustained when the party or his attorney admits that the original is not in existence. In such case secondary evidence may be given without notice.[2]

§ **1290. Opposite Attorney in Possession of Papers.**— The notice to produce may be served upon the attorney of the party in possession of the instrument as effectively as if served upon the party himself.[3] And service upon the attorney or agent is as good in actions of a penal nature as in any other.[4] A subsequent change of attorneys will not invalidate the notice, provided it was served upon the attorney for the time being.[5]

§ **1291. One of Several Joint Parties.**— Either one of two or more joint plaintiffs or defendants may be served with notice of this kind with like effect as though it were served upon each of them, provided they have possession or control of the desired document, and an admission by either that the instrument is destroyed will dispense with notice entirely, and warrant proof of the contents of the instrument destroyed by the next best evidence at the command of the party.[6]

§ **1292. Personal Service Not Indispensable.**— It is not essential in all cases to show personal service of the notice to produce. It has been held well served when left at the usual place of abode of the party intended to be affected

[1] Doe *v.* Spitty, 3 Barn. & Adol., 182.
[2] Foster *v.* Pointer, 9 Carr. & P., 718.
[3] Simington *v.* Kent, 8 Ala., 691; Jefford *v.* Ringgold, 6 Ala., 544.
[4] Cates *v.* Winter, 3 T. R., 306.
[5] Doe *v.* Martin, 1 M. & Rob., 242.
[6] Marlow *v.* Marlow, 77 Ill., 633; King *v.* Lowry, 20 Barb., 532.

thereby, with some person of competent age, or where it was left at the office of the attorney.[1] But in case of service otherwise than personal, when, through no fault of the party required to produce, the notice fails to reach him in time, reasonable indulgence should be extended to him to enable him to produce the original, in order to correct any errors or false statements by which he might be prejudiced, in the copy, or the parol testimony.

[1] Meyrick *v.* Woods, Carr. & Marsh., 452.

VII. Service.

§ 1293. Importance of Proper Service.
1294. Division of Subject.
1295. By Whom Served.
1296. Not by Party in Interest.
1297. By Unofficial Person.
1298. When the Officer a Party.
1299. Notice of Motions, etc.
1300. To Take Depositions.
1301. Upon Whom Served.
1302. Original Process Served on Agent.
1303. Service Upon Corporations.
1304. Statute for Benefit of Residents.
1305. Reasonableness of Rule.
1306. Service Upon Foreign Corporations — Federal Judiciary Act.
1307. United States Circuit Courts Have Limited Jurisdiction.
1308. How Jurisdiction Obtained in Federal Courts.
1309. How Corporations Served.
1310. Service Upon Ticket Agent.
1311. Where the Statute Directory and Permissive.
1312. Service on Municipal Corporation.
1313. Upon City Clerk, Insufficient.
1314. Service Upon Partners.
1315. Principal Defendant,
1316. Service Upon Minors.
1317. Upon Convicts.
1318. Service Upon Party by Wrong Name.
1319. Variance Between Name in Process and Other Papers.
1320. Several Defendants in Different Counties.
1321. Service Upon Attorney.
1322. Same in Suit Before Justice of Peace.
1323. Should Not be Upon Attorney Whose Connection with Case Has Ceased.
1324. "Due" Notice.
1325. Application for Injunction.
1326. Construction of "Reasonable" Notice.
1327. Time Fixed by Statute.
1328. Admission of Notice.
1329. Time of Notice of Motion for New Trial.
1330. Time Computed from Date of Service.
1331. How Time Computed.
1332. Summons Must be for Full Time.
1333. Reference to Other Parts of Chapter.

§ 1334. Manner and Mode of Service.
1335. Personal Service.
1336. Leaving it at Place of Abode, Not Sufficient.
1337. Personal Upon Attorney.
1338. Strict Requirement as to Summons.
1339. Different Modes of Personal Service.
1340. By Reading Original, or Delivering Writing.
1341. Written, Must be by Delivery.
1342. Rule Deduced from Foregoing.
1343. Service at Place of Abode.
1344. General Remarks.
1345. Leaving at Residence or Place of Business Only Prescribed by Statute.
1346. In What Cases Officer May Elect Mode.
1347. Leaving at Place of Residence.
1348. Family of Which Party is a Member.
1349. Must be at Present Place of Abode.
1350. Necessity for Strict Construction.
1351. Actions Against Property.
1352. Personal Service in Foreign State.
1353. Proof of Foreign Service.
1354. Acknowledgment of Service.
1355. Service by Mail.
1356. Chancery Proceedings in United States Court.
1357. On Board Foreign Vessel.
1358. Non-resident Temporarily Within Jurisdiction — When May be Effectually Served, and When Exempt.
1359. Sunday or Legal Holiday.
1360. Reference to Other Chapters.

§ 1293. Importance of Proper Service.— No step taken in any proceeding which has for its object the giving of notice of anything done or to be done in the past, present or future, in the course of practice in the courts, is of greater, or perhaps equal, importance to that of *serving* notice upon the party to be affected by the proceeding. The importance of careful attention to this matter arises from the fact that it is an act for the performance of which numerous ways are provided, and consequently the possibilities of error are multiplied. Another reason for extraordinary care in serving notice of any proceeding by which the interests of the party served may be affected, is that mistakes or omissions of duty in this respect are more likely to prove

fatal to the validity of the proceeding. There can be no amendment of the service after any portion of the time has elapsed for which the party should have had notice. When the method of obtaining service is in its nature *constructive*, as where the notice may be served by leaving it at the place of business or residence of the party interested, the rules governing the service are still more strictly enforced, and fatal mistakes are more likely to occur.[1]

§ **1294. Division of Subject.**— In considering this branch of our subject, it may be more conveniently treated, and the substance of the authorities cited, by way of illustration, more perspicuously arranged, by considering in regular order: 1. *By whom the notice should be served.* 2. *Upon whom served.* 3. *The time of service.* 4. *The manner and mode of service.*

§ **1295. By Whom Served.**— The general practice, when formal notice is required of any impending proceeding in court, is to have the notice served by the executive officer of the court; but this is not always essential. Matters of this kind being to a considerable extent within the control of the different courts, when they are not regulated by statute, renders it impossible to lay down a rule applicable to all forms of notice, and which would be acceptable in all the different tribunals where such notices are required. But where the notice to be served partakes of the nature of the original process; or when the proceeding to be noticed is intended to result in a judgment or decree upon which *final* process may issue, it is the safer and better practice to have the notice served by an officer. When the original process is directed to a marshal, sheriff or constable, it should be served by such officer or his deputies, unless there be some statutory provision, by which some one else may be substituted.[2]

§ **1296. Not by Party in Interest.**— We know of no exceptions to the rule that original process can never be

[1] *Infra.*

[2] Schwabacker *v.* Reilly, 2 Dill., 127.

served by a party to the suit upon his adversary;[1] though the rule is not generally so strict with reference to some other notices, which are regarded as less important.

§ 1297. By Unofficial Person.— Where an order of the board of health of a village, for the discontinuance of an offensive employment, was required to be brought to the knowledge of the person subject to such order by a formal notice, it was held sufficiently served, though not by an officer; but was only held so because its receipt by the person affected was proved.[2] So, also, has it been held, under a peculiar statute, that original process might be served by an unofficial person, instead of a sheriff, and such service could be authenticated by the affidavit of the person by whom it was served, though not by his mere certificate.[3] Service of notice of a mechanic's lien may be made by a constable or any competent witness.[4]

§ 1298. When the Officer a Party.— Service of original process is not only permitted to be made, in some instances, by those who are not clothed with any official character whatever, but when the only available officer is a party to the proceeding to be noticed, it becomes absolutely necessary that some one else should be selected. When the substitute for a sheriff is selected by the court, he is generally styled an *elisor*, and is clothed with all necessary authority to discharge his duty in the premises.

§ 1299. Notice of Motions, etc.— Notices of interlocutory motions, notice of trial, notice to take depositions, and the like, it is generally understood, may be served by an unofficial person with the same effect as by an officer of the court, provided sufficient care be taken to properly authenticate such service.

§ 1300. To Take Depositions.— Where one of the parties to a suit desires to take depositions, to be used at the

[1] Snydacker *v.* Brosse, 51 Ill., 357.
[2] Winthrop *v.* Farrar, 11 Allen, 398.
[3] Coffee *v.* Gates, 28 Ark., 43.
[4] Hassett *v.* Rust, 64 Mo., 325.

trial, the service of notice upon the opposite party is occasionally questioned, because it is claimed to have been served by an improper person. In the state of Vermont it was held that such a notice might be served by the sheriff of the county in which the suit was pending, upon the opposite party in another county.[1] And under the provisions of a statute of the same state, it was held that notice of the taking of depositions to be used in a trial before a justice of the peace should be given personally and orally by the justice himself.[2] It has also been held elsewhere, when depositions were taken under a foreign commission, and the interrogatories were not filed in time to give the opposite party an opportunity to file cross-interrogatories, thereby rendering notice essential, that such notice would properly come from the commissioner before whom the depositions were taken, and not from the attorney.[3]

§ 1301. Upon Whom Served.—In determining *upon whom service should be made*, the courts have had to meet questions somewhat difficult of solution. Considerations of the character of parties to judicial proceedings, the relations subsisting between those interested, and the manner in which they are represented in the contests, all tend to modify, in a greater or less degree, the simple rule that "notice should be served upon the party adversely interested in the proceeding." In matters of practice, it is often not only extremely inconvenient to serve the party, but it is sometimes impossible; and, except with respect to the original process, is more effective, and best subserves the interests of all parties, by being served upon a representative. And even a summons, citation, or original notice may be, under some circumstances, served upon an agent, with a stronger probability of conveying information to the principal, than would arise from constructive service upon the principal himself, by means of publication in a newspaper,

[1] Parker *v.* Meader, 32 Vt., 300.
[2] See Redfield, J., in Fitts *v.* Whitney, 32 Vt., 559.
[3] Parker *v.* Sedwick, 5 Md., 281.

or posting written or printed notices upon court-house doors, at school-houses and cross-roads.

§ 1302. Original Process Served on Agent.— Original process may, under certain circumstances, be legally served upon the agent of the party to be affected by the proceeding, as where such party is a corporation, foreign to the jurisdiction of the court from which the summons issues, but doing business, and having its interests represented by an agent or manager within such jurisdiction.[1] However, the power of obtaining jurisdiction by this kind of service arises from the non-residence of the corporation notified, rather than from its corporate character; for service upon the official representative of a domestic corporation, though equally valid, is not regarded as service upon an agent, but upon *the corporation itself.* It is a resident of the state or territory where it was incorporated, in the sense that it has all the local habitation it can have, there and nowhere else. It can only be reached personally, by serving those who exercise its powers, and perform its functions; and when its officers and directors act beyond the limits of the state by whose authority they were created a body corporate, they become merely agents of the corporation.[2] When they are exercising their official authority in the state where they were incorporated, they are, for the purpose of service of process, the corporation itself; therefore, service upon them is personal service.[3]

§ 1303. Service Upon Corporations.— In most, if not all, the states, jurisdiction of foreign corporations doing business within their limits is secured by statutory provisions, requiring as a condition precedent to their being permitted to transact such business in the state, that they designate some person as authorized to represent them, and upon whom service may be had of all process issuing against

[1] Lafayette Insurance Co. *v.* French, 18 How., 404; Weymouth *v.* Washington G. & A. R. R. Co., 1 MacArthur, 19.

[2] Bank of Augusta *v.* Earle, 13 Pet., 588.

[3] Bank of Augusta *v.* Earle, *supra.*

the corporation.[1] It is sufficient, however, to render service upon such agent binding, if the statute simply declares that service may be had upon resident agents of foreign corporations doing business in the state.[2] By engaging in business within the limits of a state, where such a statute is in force, the corporation will be regarded as thereby voluntarily submitting to the territorial jurisdiction of its courts, subject only to the right of removal to a federal court.[3]

§ **1304. Statute for Benefit of Residents.**—But jurisdiction cannot in every instance be obtained in this manner, even under such statutory provisions.[4] The statute is intended for the benefit and protection of the citizens of the state where it is enacted. Therefore, in a case where the cause of action arose out of the state where the suit was pending, and between citizens of another state and a foreign corporation, and process was served by leaving a copy of the writ with its "agent and attorney" within the state, it was held that the court thereby obtained no jurisdiction of the defendant.[5]

§ **1305. Reasonableness of Rule.**—There can be no doubt of the justice of the very temperate provisions interposed by the legislative bodies of the states for the protection of their own citizens. To require a non-resident corporation to submit to the local jurisdiction of the courts, where it undertakes to transact business, is simply to place it as near as may be on an equal footing with domestic corporations and resident individuals who may be its rivals for public patronage. It would be eminently unjust to compel the states to grant to non-residents the same privileges, immunities and rights as are enjoyed by their own citizens, and then deprive the latter of the same power of enforcing contracts against the foreigners as they might exercise against

[1] Gantt's Dig., § 3561, as amended; Laws of Ark. (1875), p. 190.
[2] Lafayette Insurance Co. *v.* French, *supra*, § 1302.
[3] *Ibid.*
[4] See Gen. St., Vt., ch. 87, § 5 *et seq.*
[5] Sawyer *v.* North American Life Ins. Co., 46 Vt., 697.

resident persons and corporate bodies. But by the operation of the act of congress regulating the practice in federal courts, known as the Judiciary Act, this unjust discrimination is effected.[1]

§ 1306. Service Upon Foreign Corporations — Federal Judiciary Act.— This act provides that no civil suit shall be brought in the circuit court of the United States, against any person, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the process.[2] The effect of this provision is to deprive the circuit courts of all original jurisdiction over corporations foreign to the state composing, in whole or in part, the district where the cause of action arises. The corporation having no legal existence beyond the boundaries of the sovereignty by which it was created, cannot migrate. Consequently, it could neither be an "inhabitant" of the district, nor could it be found in such district at the time of serving process, though its officers might be passing through or found within such district; for the officers are not the corporation.[3]

§ 1307. United States Circuit Courts Have Limited Jurisdiction.— This question is ably discussed, and the cases thoroughly reviewed by Judge Dillon, in a recent case decided in the circuit court for the eastern district of Arkansas.[4] There the action was by a citizen of Arkansas upon a fire policy issued by defendant, a corporation created under the laws of the state of Illinois, upon plaintiff's property

[1] Originally enacted in 1789, and re-enacted without change by the act of March 3, 1875, § 1.

[2] *Supra.*

[3] Bank of Augusta *v.* Earle, *supra;* Pomeroy *v.* N. Y. & N. H. R. R. Co., 4 Blatchf., 120; Day *v.* Newark India Rubber Co., 1 Blatchf., 628; Southern & Atlantic Tel. Co. *v.* New Orleans, etc., R. R. Co., 2 Cent. L. J., 88.

[4] Stillwell *v.* Empire Fire Insurance Co., 4 Cent. L. J., 463. See, also, Cunningham *v.* Southern Ex. Co., 67 N. C., 425. But see Williams *v.* Empire Ins. Co., 6 Reporter, 673; *Ex parte* Schollenberger, 6 Reporter, 5; R. R. Co. *v.* Harris, 12 Wall., 65; Railway Co. *v.* Whitton, 13 Wall., 284.

located in the state of Arkansas. It is provided by statute in the latter state, that "no insurance company not of this state, nor its agents, shall do business in this state, until it has filed with the auditor of this state a written stipulation, duly authenticated by the company, agreeing that legal process affecting the company, served on the auditor or the agent specified by the said company, to receive service of process for the company, shall have the same effect as if served personally on the company within the state."[1] It was admitted that the process was served as required by the statute; but the court held, upon the authority of the cases already cited, that jurisdiction could not be obtained *in the circuit court* by such service, though the justice of the statutory provision was fully recognized. The restrictive provision of the judiciary act was recognized as a defect in the jurisdiction of the circuit courts, but one which had existed since the organization of such courts.

§ 1308. How Jurisdiction Obtained in Federal Courts. There is no doubt that jurisdiction may be obtained of non-resident corporations by this kind of service of process issuing out of state courts. The statutes are enacted for the express purpose of enabling them to obtain service upon corporations doing business within such states, and eminent federal judges have not hesitated to notice without disapproval the indirect means frequently employed for bringing such corporations into the federal courts, by instituting the suits in the courts of the state, and then removing them to the circuit court of the United States.[2]

§ 1309. How Corporations Served.— Upon what particular officer of a corporation, or upon what class of officers, process or other form of notice may be served in proceedings against the corporation, is generally regulated by statute in the different states, and by act of congress in such cases as arise in the federal courts. They include directors,

[1] Gantt's Dig., § 3561; Laws 1875, p. 190.

[2] See Stillwell *v.* Empire Insurance Co., *supra;* Atlantic Tel. Co. *v.* New Orleans, etc., R. R. Co., *supra.* § 1306.

presidents, secretaries, treasurers, managing agents, and a multiplicity of other official representatives too numerous and too diverse in their titles to admit of enumeration. The managing agent is recognized by the courts, both federal and state, as a proper person to serve in such cases.[1] Though process was held not well served where the return showed service on the "business manager," as this was an officer unknown to the law.[2]

§ 1310. Service Upon Ticket Agent.— Where the proceeding was against a railroad corporation, the process was held to be properly served upon any one left in charge of the depot, such person being a ticket agent or other subordinate officer, when the company had designated no one else to accept service of process issued against it.[3] But summons was held not well served upon a mere book-keeper of a corporation.[4]

§ 1311. Where the Statute Directory and Permissive.— It has also been held, where the language of the statute was that service *may* be had on a director of a railroad corporation, that such language was permissive and directory, and not restrictive or mandatory, and hence service on a station agent was sufficient.[5]

§ 1312. Service on Municipal Corporation.— In suits against public or municipal corporations, except where otherwise provided by statute, process should be served upon the principal officer or representative of the executive branch of the government, at the time of service. And it would seem that he might be served with such process, or with notice of any proceeding pending against the corporation, substantially as though the action or proceeding were pending against him in his individual capacity. As

[1] New England Car Spring Co. *v.* Union Rubber Co., 4 Blatch., 1; Scorpion S. M. Co. *v.* Marsano, 10 Nev., 370.

[2] *Ibid.*

[3] M., K. & T. Railway Company *v.* Crowe, 9 Kan., 496.

[4] Chambers *v.* King Wrought Iron, etc., Co., 16 Kan., 270.

[5] State *v.* Hannibal & St. Jo. R. R. Co., 51 Mo., 532.

where a suit was instituted by attachment against a school district, under a statute providing that all writs against such corporations should be served upon the clerk; and the attachment law required that a copy of the writ and a list of the property should be delivered *to the party* or left at his usual place of abode, an attested copy of the writ, etc., being left during the absence of the clerk, at his usual place of abode, with his wife, it was held that the service was sufficient.[1]

§ **1313. Upon City Clerk, Insufficient.**— But a summons or other notice served upon the clerk of a city would be ineffectual to authorize a judicial proceeding against the city, unless such officer was legally designated for that purpose. The proper officer to serve in such cases is the mayor of the city.[2]

§ **1314. Service Upon Partners.**— Where there are two or more parties interested as partners adversely to the motion or other proceeding to be noticed, except where the proceeding is in its nature a judicial investigation, service upon one of such partners would be sufficient to bind both or all.[3]

§ **1315. Principal Defendant.**— Where there are several parties defendant in a suit, and the statute, or rules of practice, require service, under certain circumstances, to be had upon the principal defendant, it becomes an important subject of inquiry as to who is such principal defendant. In deciding this matter in a case where the party served was a corporation, and the custodian of certain stock belonging to another defendant, who was not served, it was held that the principal defendant must be one such as are known in the chancery books as "active parties;" and that in this case that was the owner of the stock, and not the corporation.[4]

[1] Dow *v.* School Dist., 46 Vt., 108.

[2] Nichols *v.* Boston, 98 Mass., 39.

[3] Perrine *v.* Miller, 4 Thomp. & C. (N. Y.), 36; Miller *v.* Perrine, 1 Hun (N. Y.), 620.

[4] Coleman's Appeal, 75 Pa. St., 441.

§ 1316. **Service Upon Minors.**— Service may be had upon minors, the same as upon adult parties, except where the statute lays down a different rule of practice. But a minor will not be bound by a written acknowledgment of service, whether such writing is executed by himself or his guardian, or both.[1]

§ 1317. **Upon Convicts.**— So may process be served upon a convict confined in the penitentiary, with the same effect as such service would have upon another.[2]

§ 1318. **Service Upon Party by Wrong Name.**— The object of serving the original process or other form of notice upon the party, being to advise him of the pendency of the action or proceeding, it is more important that the proper party be served than that he be served by the proper name. As a rule, therefore, the service of process upon the proper party, but by a wrong name, will sustain a judgment entered against such party pursuant to the process served.[3]

§ 1319. **Variance Between Name in Process and Other Papers.**— It has been held, however, that a judgment against a party in his right name, which name varies from that appearing in all other stages of the proceedings, though process be personally served, would be of no avail against a defendant not appearing to the action.[4] It is difficult to see in what essential particular the case supposed differs from any other in which there is a misnomer of a defendant who is in fact served. The authority of this case might well be doubted, had it been decided according to the doctrine laid down in the *dictum.*

§ 1320. **Several Defendants in Different Counties.**— When an action is against several defendants, some of whom live within the county where the suit is instituted, and some of them are residents of another county, in the same state,

[1] Kansas City & C. R. R. Co. *v.* Campbell, 62 Mo., 585.

[2] Davis *v.* Duffle, 1 Abb. App. Dec., 486.

[3] Welsh *v.* Kirkpatrick, 30 Cal., 202; Parry *v.* Woodson, 33 Mo., 347; Morgan *v.* Woods, 33 Ind., 23.

[4] Moulton *v.* de ma Carty, 6 Rob. (N. Y.), 470.

the order in which such defendants shall be served is sometimes prescribed by statute so that one or more of those resident within the jurisdiction of the court shall be first served. Where this provision is in force, it should be followed in order to give the court jurisdiction.[1]

§ **1321. Service Upon Attorney.**— Where the matter to be noticed is anything in the nature of an interlocutory motion or proceeding arising in the course of a suit, either at law or in equity, including notices necessary in taking testimony, notices of appeal, etc., the notice should be served upon the attorney where one is employed.[2] And even where the attorney of record had retired from the case, but no one had been substituted, as required by the statute regulating the practice of the court, a notice served upon the retiring attorney, whose name still appeared upon the record, was held well served.[3]

§ **1322. Same in Suit Before Justice of Peace.**— So, where notice of appeal from a justice's court was served upon the attorney of appellee, though attorneys were not necessary, and the statute required notice of such appeals to be served upon "the party," omitting the words "or his attorney," used in the statutes governing appeals from other courts, it was held that the omission was evidently without special design, and service upon an attorney in such case was sufficient.[4]

§ **1323. Should Not be Upon Attorney Whose Connection with Case Has Ceased.**— A distinction is to be made between cases where the attorney upon whom notice is served has simply retired from the case, and where his connection with it has ceased by reason of its having reached judgment, and the execution has been directed. In the latter

[1] Clark *v.* Lichtenberg, 33 Mich., 307.

[2] Bailey *v.* Wright, 24 Ark., 73; Rivers *v.* Walker, 1 Dal., 85; Nash *v.* Gilkeson, 5 S. & R., 352; Newlin *v.* Newlin, 8 S. & R., 41; Hutcheson *v.* Johnson, 1 Bin., 59.

[3] Grant *v.* White, 6 Cal., 55; Herrin *v.* Libbey, 36 Me., 350.

[4] Welton *v.* Garibardi, 6 Cal., 245.

case, a notice upon the attorney to stay proceedings at law would not be binding upon the party, because the relation of attorney and client between them has ceased with reference to that case.[1]

§ 1324. **Due Notice.**— When by the terms of the statute, or the rules laid down by the court for the regulation of practice therein, any proceeding is authorized only upon *due* notice to the opposite party, the term "due" is generally understood to have reference to the length of *time* which should elapse between the service of the notice and the hearing of the motion or other proceeding. This indefinite word is employed where it is impracticable or inexpedient to undertake to fix the time for any given number of days. It necessarily leaves to the court a very large discretion in the matter of time; for not only is the word indefinite in its general signification, but it is used in reference to so many different and totally dissimilar proceedings, that it has been found impossible for the courts to give it a rational construction, applicable alike to all cases. The nearest approach to a fixed rule would be, that *due* notice of any judicial proceeding is notice for such time as the circumstances of each particular case and the situation of the parties may, in the discretion of the court, require. This, however, is no *rule* at all, but merely a relegation of the whole question to the discretion of the court wherein the matter is pending.[2]

§ 1325. **Application for Injunction.**— In the case of an application for injunction to restrain defendant from the prosecution of a suit in ejectment, where due notice was required, and the notice being served on the day next preceding that upon which the case was set for hearing, the court, in view of all the circumstances, finding that there was no laches on the part of the party making the application, held such notice sufficient.[3]

[1] Kamm *v.* Stark, 1 Sawyer, 547.

[2] Lawrence *v.* Bowman, 1 McAllister, C. Ct., 419; Allen *v.* Hill, 16 Cal., 113.

[3] Lawrence *v.* Bowman, *supra.*

§ 1326. **Construction of Reasonable Notice.**— Cases sometimes arise where notice is required, without a time being fixed, or intimated beyond the provision that it shall be "reasonable" notice. In order to meet the requirements of the statute, notwithstanding the vagueness of its provisions, the courts resort to other statutes to learn what time is thereby fixed in analogous cases.

§ 1327. **Time Fixed by Statute.**— Where, however, the time within which notice is to be served is fixed by statute, a failure to comply will be fatal. As where an appeal was taken and the notice was not served in time, the appeal was dismissed, notwithstanding the respondent had made the following written acceptance of service: "Due service of a copy of the within notice is hereby accepted to have been made this 20th day of February, 1863." And the judgment was affirmed on appeal, the court holding that the acceptance only admitted service on a certain date, which by the record appeared to be too late.[1]

§ 1328. **Admission of Notice.**— But an unqualified admission of "due" service of notice of appeal, without mentioning any date, amounts to a waiver of all objections to the time within which the notice was served.[2]

§ 1329. **Time of Notice of Motion for New Trial.**— It is nearly, if not quite, the universal rule to have a time fixed by statute or rule of court, within which notice must be given of an intention to move for a new trial. This notice may be by an entry on a book kept for that purpose, or by service on the opposite party, but must be served within the prescribed time, or it will be considered that the party has waived his right to have such motion entertained.[3] In the case of Carpentier *v.* Thurston,[4] the matter of *time* became

[1] Towdy *v.* Ellis, 22 Cal., 650.

[2] Struver *v.* Ocean Insurance Co., 9 Abb. Pr., 23; Talman *v.* Barnes, 12 Wend., 227.

[3] Caney *v.* Silverthorne, 9 Cal., 67; Ellsassar *v.* Hunter, 26 Cal., 279; State *v.* First National Bank, 4 Nev., 358.

[4] 30 Cal., 123.

important in considering whether the notice of motion for a new trial was served in compliance with the statute. The time fixed, in trials by the court, was "ten days after receiving written notice of the rendering of the decision of the judge." The cause having been previously decided, the judge, on the 11th of March, and during vacation, delivered to plaintiff written findings and a draft of judgment in his favor. On the same day, plaintiff gave defendant the following written notice: After stating the venue and the title of the cause — "Please take notice that the findings in the above entitled cause have this day been signed by the judge of said court, and his decision herein rendered in favor of plaintiff, March 11, 1865." The findings and draft of judgment were delivered to the clerk of the court, and were by him filed and the judgment entered March 13, and on the same day, notice of defendant's intention to move for a new trial was served upon plaintiff. Construing the written notice from plaintiff most strongly against its author, the appellate court held that, as the decision was *not* rendered on the 11th, as stated in such notice, consequently it was not a notice of the rendition of judgment, but simply of the signing findings, and that there was no notice of the rendering of the decision until the 13th, which allowed defendant until the 23d to give notice of his intended motion.

§ **1330. Time Computed from Date of Service.**—It will be observed that the time is computed from the *service*, and not from the *date* of the notice, in order to ascertain whether it is due, reasonable, or given within the prescribed time. So where ten days' notice of a sale was required by contract, and the notice was dated on the 15th, and served on the 17th, that the sale would take place on "ten days after date," the service was held insufficient.[1]

§ **1331. How Time Computed.**— In calculating the time of service of a notice of hearing, either the day on which

[1] Chase *v.* Hogan, 6 Bosw. (N. Y.), 431.

the notice is served, or the day on which the hearing is to be had, is excluded from the computation.[1]

§ **1332. Summons Must be for Full Time.**— The service of original process, in a suit at law, is never left to conjecture, in point of time; and where there is any difference in the strictness with which the law is enforced in this particular, between a summons and a notice of hearing of a motion or other interlocutory proceeding, where the time of service is prescribed, the more rigid compliance is required in serving the original process. Unless the summons is served for the full time before return day, it is an absolute nullity.[2]

§ **1333. Time of Notice of Taking Depositions, etc.**— As to the time required, in the service of notices to take depositions, and to produce papers, etc., on the trial, the reader is referred to the parts of this chapter where those subjects are separately treated.[3]

§ **1334. Manner and Mode of Service.**— The manner and mode of service depends, of course, upon the character of the proceeding, as well as the statute by which the same is regulated. In general, however, where notice is required by statute or rule of court, and the method of serving the same is not laid down, it is understood that there shall be *personal* service.[4] And when the statutory proceeding is one in derogation of common right, as the involuntary sale of the property of an individual, the statute must be strictly construed and closely pursued.[5]

§ **1335. Personal Service.**— When it appears from a reasonable construction of the statute or rule that *personal* service was intended, no other can be substituted so as to

[1] Anderson *v.* Baughman, 6 Mich., 298.

[2] Draper *v.* Draper, 59 Ill., 119.

[3] See *ante.*

[4] Rathburn *v.* Acker, 18 Barb., 393; McDermot *v.* Board of Public, etc., 25 Barb., 635.

[5] Rathburn *v.* Acker, *supra.*

render the proceeding binding upon the party served, in case he refuses to recognize the same.[1]

§ 1336. **Leaving it at Place of Abode, Not Sufficient.**— So where personal service of a notice from street commissioners to the owners of property adjacent to certain streets, requiring such property owners to improve the street, it was held that such notice could not be legally served during the temporary absence of the owner, by leaving it at his usual place of abode.[2]

§ 1337. **Personal Upon Attorney.**— So, also, where the notice was one which should have been served personally upon the attorney of the adverse party, it was not well served by putting it under the attorney's door, and taking no further care to see that it was received. Had there been a call upon the attorney on the following day when his office door was open, and an inquiry after the notice, the service might have been regarded as sufficient, because such diligence might have insured its receipt. And there is no form of notice, except perhaps original process, which may be invalidated by reason of its being served in an improper manner, provided it be received in due time.[3]

§ 1338. **Strict Requirement as to Summons.**— Original process, in order to sustain a personal judgment, should be personally served except where some other form of service is provided by statute. So strict are the courts in enforcing the requirements of the statute in this respect, that in one case where personal service was required, it was held that an admission of service would not be sufficient to warrant judgment by default, unless it was an admission of *personal* service.[4] So where personal service of the original notice was required by statute in a suit against partners, it was held that service upon the wife of one of such partners would not be sufficient.[5]

[1] Bond *v.* Whitfield, 28 Ga., 537.
[2] Simons *v.* Gardiner, 6 R. I., 255.
[3] Burdett *v.* Lewis, 7 C. B. (N. S.), 791.
[4] Read *v.* French, 28 N. Y., 285.
[5] Brydolf *v.* Wolf, 32 Iowa, 509.

§ 1339. **Different Modes of Personal Service.**— But where there is no question but that the notice is intended to be served personally upon the party to be affected by the action or proceeding noticed, the *manner* of making the service is subject to certain modifications incident to the *form* of the notice. It need hardly be remarked that a verbal notice may be orally served; but when the notice is in writing, there is more than one method provided for serving it personally; the first and most obvious is by delivering to the party the original. The second is by delivering a copy, and a third is by reading the notice to the person served.

§ 1340. **By Reading Original or Delivering Writing.**— Whether a written notice shall be served by delivery of the writing or a copy thereof, or by reading the original, or by either, at the option of the officer or other person making the service, is, in most instances, regulated by statute; but this is not always the case. And when the statute is silent as to the manner of service of a notice in writing, beyond the requirement that it shall be personal, the question may arise as to whether reading the written notice would be a sufficient compliance with the law.

§ 1341. **Written, Must be by Delivery.**—In the case of Pursley *v.* Hays,[1] it is intimated that personal service of an original notice, when the same is attached to the petition, may be made by reading, as well as by delivery of a copy to the party served. However, under a statute of Rhode Island, requiring "reasonable notice in writing" of the appointment or removal of a guardian, it was held that such notice could not be personally served by reading the same.[2] Judge Story, in delivering the opinion of the court, said: "I understand that the notice must be a notice in writing; that the officer must leave with the party a written notice, an original from the clerk, or at least a certified copy, in writing, thereof. In no just sense can a notice by reading

[1] 22 Iowa, 11, 28.

[2] Hart *v.* Gray, 3 Sumn. (U. S.), 339.

be deemed a notice by writing. * * * No instance, I believe, can be produced where a notice, required to be served and given in writing, has been held valid, unless the service has been by the delivery of the paper itself, or a copy in writing."[1]

§ 1342. Rule Deduced from Foregoing.— We have seen that when the manner and mode of service is not pointed out by the statute, *personal* service is generally understood.[2] It seems also to be settled, both upon principle and authority, that a *written* notice can only be served by delivery of the original, or an authenticated copy.[3] If the foregoing is sound doctrine, we may deduce therefrom the rule that a notice, required by statute to be in writing, in the absence of any designation of the manner and mode of its service, shall be served by delivery of the original or a copy thereof to the party to be affected by the proceeding noticed. However, the cases have not all been decided in conformity to this rule. In the case of Hildreth *v.* Lowell,[4] it is decided, where it was required by a city ordinance that the officers should "give notice in writing to the several owners" of property across which it was intended to lay out a drain, that the provisions of the ordinance were sufficiently complied with by giving personal notice to the known owners, and by posting two or more copies of such notice at public places in the city. But in whatever manner the original process may be served, it will be regarded as sufficient, both at law and in equity, where the receipt of the writ is properly acknowledged in writing.[5]

§ 1343. Service at Place of Abode.— We now come to the consideration of a species of service which has been denominated *personal*, to distinguish it from *service by mail;*[6] and *substituted*, as contradistinguished from service *strictly*

[1] See Fitts *v.* Whitney, 32 Vt., 589.
[2] See *ante*, § 1334.
[3] Hart *v.* Gray, *supra;* Fitts *v.* Whitney, *supra.*
[4] 11 Gray, 345.
[5] Banks *v.* Banks, 31 Ill., 162.
[6] See *ante*, part IV, ch. X.

personal.[1] It has also been called both *actual*[2] and *constructive*[3] service. It is made by leaving the original or a copy at the usual place of abode of the party to be served, with some one other than himself.

§ 1344. **General Remarks.**— The fact that this method of service is so differently classified is not at all surprising when we consider the different circumstances under which it is employed. When the matter noticed is the dishonor of a note or bill, the prompt payment of which the party notified has conditionally guarantied, it may fairly be presumed that he has provided against the contingency which he knows *may* arise at a time certain, and that a notice left for him at his residence or place of business would be less likely to meet with a careless reception from those in charge during his absence than a notice of a matter of which he has had no previous warning, and for which he could have made no adequate preparation. He may justly be presumed to remember that he has indorsed a bill or note, which *may* be dishonored on a certain day, and that he has left directions concerning the receipt of notices of such matters. No man may be supposed to calculate upon being served with original process, or with notice of an interlocutory or other proceeding in court.

§ 1345. **Leaving at Residence or Place of Business Only Prescribed by Statute.**— However, it is quite certain that though this method of service may be very liberally viewed for some purposes, yet it is, in no instance, regarded with the same favor as service strictly personal. So far as it is resorted to in matters of practice, it is recognized only because it is prescribed by statute, or is employed in a proceeding analogous to one where it is so authorized, and, like all statutory innovations, must be strictly construed.[4]

[1] Chittenden *v.* Hobbs, 9 Iowa, 417.

[2] Sturgis *v.* Fay, 16 Ind., 429.

[3] Brownfield *v.* Dyer, 7 Bush (Ky.), 505.

[4] Brownfield *v.* Dyer, 7 Bush (Ky.), 505; Mullins *v.* Sparks, 43 Miss., 129; Pollard *v.* Wegener, 13 Wis., 569.

§ 1346. In What Cases Officer May Elect Mode.— In some cases the statute authorizes this method of service to be resorted to at the option of the officer or other party who has the notice in charge to serve, regardless of whether service might not be had upon the party in person.[1] But in other cases it is only permitted when personal service is impracticable.[2] In order to justify the leaving of the notice or writ, with any one other than the person to be notified, it is necessary not only that it should appear to be the most convenient and expeditious method of disposing of the matter, but that it was the only practicable method at the time. It is not sufficient for the return to show that the party was absent from his residence where the paper was left, but that he could not be found within the jurisdiction of the court.[3]

§ 1347. Leaving at Place of Residence.— Under a statute requiring a summons to be delivered to the person served, or left at his place of residence, it is not sufficient to leave a copy at his place of business, unless it is also where he resides at the time.[4] And where it is required, in the event that it is not served personally, that it shall be left at defendant's usual place of abode, with a member of his family, etc., the summons will not be sufficiently served by leaving it with his wife unless it be left with her at the husband's place of abode as the statute requires.[5]

§ 1348. Family of Which Party is a Member.— But it will be a sufficient compliance with the statute, so far as it relates to the *person* with whom it is to be left, if such person be a member of the family to which the party belongs, whether he be the head of the family or not. It is sufficient if the party to be served, and the one with whom the paper is left, live together in the same family.[6]

[1] Hughes *v.* Osborn, 42 Ind., 450; Rosseau *v.* Gayarre, 24 La. An., 355.
[2] Davis *v.* Burt, 7 Iowa, 56; Chittenden *v.* Hobbs, 9 id., 417.
[3] Matteson *v.* Smith, 37 Wis., 333.
[4] Lambert *v.* Sample, 25 Ohio St., 336.
[5] Hewitt *v.* Weatherby, 57 Mo., 276.
[6] Converse *v.* Warren, 4 Iowa, 158.

§ 1349. **Must be at Present Place of Abode.**— Courts of equity are equally strict in enforcing the observance of the rules governing the service of process, when their subpœnas are served otherwise than personally, in the strictest sense of the term. It has accordingly been held that it will not be sufficient to leave a subpœna at the *last* usual place of abode, but that it must be left at the *present* dwelling-house or usual place of abode of the party served.[1]

§ 1350. **Necessity for Strict Construction.**— The necessity for a strict construction of statutes authorizing the substitution of this method of service, for that which brings the matter directly to the knowledge of defendant, is fairly illustrated by the recent case of Earle *v.* McVeigh.[2] There the statute seemed sufficiently accommodating to satisfy the eagerness of the most persistent prosecution; for it provided that, during the absence of the defendant and all the members of his family, notice of suit might be served by posting it upon the front door of his usual place of abode. The defendant in this case had vacated his residence, with his family, seven months previous to the attempted service, and they had ever since resided within the Confederate lines. The notice was accordingly posted upon the front door of the tenantless house, and defendant appearing by attorney, the appearance was *stricken out*, because of the very absence alleged as a ground for the spurious service of process. The learned justice of the supreme court who rendered the opinion not only took occasion to reprobate the striking out of defendant's appearance in response to the notice, but decided, with the full concurrence of the entire bench, that the place where the notice was posted was not defendant's "usual place of abode," and hence the service was not sufficient to warrant the judgment, which was declared void. It appears from a reference to this and other of the best considered cases upon this subject, that service made in this manner must be in

[1] Hyslop *v.* Hoppock, 5 Ben., 447; S. C., 6 Bankr. Reg., 552; Pigott *v.* Snell, 59 Ill., 106.

[2] 91 United States (1 Otto), 503.

strict conformity to the statute by which it is authorized. And in no respect are the courts more exacting than in the matter of the *place* where the notice or copy should be left. If it is required to be the "place of abode," the proof of service must be in language that will describe that place and no other.[1] It will not be sufficient that it is served at the defendant's "house," for he may have many houses. Nor even at his "dwelling-house," for circumstances may render this equally indefinite. And we have seen by the case last cited that mistakes may easily be made in deciding what is the "usual place of abode." It is not sufficient that the premises are the property of defendant; that he has resided there, and may reasonably be expected to make that his dwelling-place in the future. It should be his *present* place of abode, and the qualifying word "usual" is employed simply to meet cases where the abiding place of the defendant is capriciously changed at uncertain intervals from that where he is accustomed to reside, and which he calls his home. Mere absence from home, it is true, will not destroy the character of the "place of abode;" but when the defendant has, with his family, taken up his residence elsewhere, he cannot be said to have an abiding place at his former residence, for the present abandoned.[2]

§ 1351. **Actions Against Property.**— When the object of the action is to affect the title to property, either real or personal, the notice may be served by methods still less direct than that above described, as by posting notices in public places,[3] and by publication in a newspaper,[4] when there must be a strict compliance with the statute in every substantial particular.[5]

§ 1352. **Personal Service in Foreign State.**— There is another mode of service which has been adopted in several

[1] See case cited *supra.*
[2] Earle *v.* McVeigh, *supra.*
[3] People *v.* Bernard, 43 Cal., 385.
[4] See *ante,* ch. XI, Publication of Notices.
[5] *Ibid.*

of the states, and may be resorted to in actions *in rem*, when the defendant is beyond the territorial jurisdiction of the court, and that is by serving him in person in the foreign state.[1] But such service will not support a personal judgment in the state from whence the process issues.[2] Where a suit was brought under such a statute, the judgment was set aside because it did not appear affirmatively from the affidavit by which the service was proved, that the copy of petition and notice were delivered to the defendant at some place without the state, and within the United States.[3] It has also been held under a similar statute in another state, that this mode of service could only be employed where publication had been ordered, and that such service would not be complete until the expiration of the time of publication.[4]

§ **1353. Proof of Foreign Service.**—It cannot be doubted that service made in this manner will be more effective as notice to the parties to be affected by the action or proceeding, than where it is published in a newspaper or posted in "public places." But considerable care is necessary in proving such service, lest the court be imposed upon by a supposititious delivery of the notice to the non-resident party. It was accordingly held in one case, that where service was made by this mode, it should be shown by the affidavit of service that the notice was served upon the identical person; the affidavit of his acknowledgment of identity not being sufficient.[5]

§ **1354. Acknowledgment of Service.**— However, where the statute provided that an original notice might be served by having the acknowledgment of service indorsed upon the notice dated and signed by the defendant, a notice so served was held to require no further formal proof of serv-

[1] Salisbury *v.* Sands, 2 Dill., 270; Darrance *v.* Preston, 18 Ia., 396.
[2] Weil *v.* Lowenthal, 10 Iowa, 575.
[3] Fisher *v.* Fredericks, 33 Mo., 612.
[4] Brooklyn Trust Co. *v.* Bulmer, 49 N. Y., 84.
[5] Cole *v.* Allen, 51 Ind., 122.

ice than such acknowledgment, and that a waiver of service so indorsed was equivalent to such acknowledgment, and was good though made in another state.[1]

§ **1355. Service by Mail.**— Notice of the dishonor and protest of bills of exchange may be served by simply depositing the same in the postoffice, properly addressed to the antecedent party to be notified.[2] But though service may be made by this mode, of such notices as are required in practice, they cannot be served in this manner with the same conclusive effect for all purposes upon the party served, as would follow a similar service of notice of protest, or personal service of original process. In matters of practice, service by this method is only resorted to as a substitute for, or an adjunct to, service by publication in a newspaper, and of course process so served would not authorize a personal judgment. Such service is usually made upon the order of the court.[3] Even when the statute authorizes the service of summons outside of the county in which the suit is instituted, where the action is on contract, this will not authorize service in actions on the case for damages for alleged fraud and deceit in making a contract.[4] The service of process by mail is only authorized under certain conditions, and as a general rule, when a party relies upon service obtained by this mode, he should be able to make it appear that such conditions were in existence at the time; otherwise such service will be insufficient.[5] When the deposit of a notice, addressed to the defendant, is by statute made one of the steps in obtaining constructive service by publication, there is the same necessity for a strict observance of the duties imposed by law, in regard to the mailing, as there is

[1] Johnson *v.* Monell, 13 Iowa, 300. But see Chickering *v.* Failes, 26 Ill., 507, where it is held that acknowledgment of service will not be sufficient; McDaniel *v.* Correll, 19 Ill., 226.

[2] See *ante*, ch. X, part IV.

[3] Wilson *v.* Basket, 47 Miss., 637.

[4] Wirtz *v.* Henry, 59 Ill., 109.

[5] Clark *v.* Adams, 33 Mich., 159.

for publishing the notice the requisite number of days.[1] So where the proof of service, in addition to the publication, was that a paper containing a copy of the notice published was deposited in the postoffice, directed to two defendants composing a firm, by their firm name, mentioning the initials of their Christian names, such service was held insufficient, for the reason that a copy of the notice should have been sent to each. Being addressed to both, its receipt by either was regarded as uncertain, so that it was held *prima facie* void as to both.[2]

§ **1356. Chancery Proceedings in United States Court.** The substituted service provided by state laws is not allowable in suits in equity in the United States courts held within those states. The manner of serving a subpœna in chancery is regulated by the acts of congress and the rules of the United States supreme court. The service must be within the district for which the federal court is held, or it will not confer jurisdiction of the person served.[3]

§ **1357. On Board Foreign Vessel.**— Process may be legally served on a defendant while he is still on board a British mail steamer, after her arrival at the dock in an American port, but before she is moored.[4]

§ **1358. Non-resident Temporarily Within Jurisdiction.**— Where "further notice" was provided by statute for non-resident defendants,[5] it was held that when such non-resident was actually found and served within the commonwealth, he was not entitled to any further notice; but the service would be regarded as sufficient.[6] This would depend, however, to some extent, upon the circumstances by which he was influenced or induced to come within the state where served. A party to a suit in chancery, pending

[1] Scorpion S. M. Co. *v.* Marsano, 10 Nev., 370.
[2] Likins *v.* McCormick, 39 Wis., 313.
[3] Hyslop *v.* Hoppock, 5 Ben., 533; McClosky *v.* Cobb, 2 Bond, 16.
[4] Peabody *v.* Hamilton, 106 Mass., 217.
[5] Mass. Gen. Stat., ch. 123, § 28; id., ch. 126.
[6] Reeder *v.* Holcomb, 105 Mass., 93.

in a state where he does not reside, who comes within such state for the purpose of testifying before a master, though he comes without *subpœna testificandum*, has been held exempt from the service of process during his sojourn for that purpose.[1] So where a person has been fraudulently enticed within the jurisdiction of the court merely for the purpose of obtaining service of process in a contemplated suit against him, such service may be set aside and vacated as irregular.[2] But where a citizen of another state, claiming to have been enticed within the territorial jurisdiction of the court for the purpose of obtaining service, suffered judgment to go by default, and afterwards came in and asked to have it set aside on the ground of the fraudulent manner in which service was obtained, the court held that his objection came too late. It should have been raised on the return of the summons.[3] Defects in regard to service of process, as well as any other steps taken to obtain jurisdiction of the party, may be waived by voluntary appearance,[4] but not by special appearance, for the purpose of raising the objection to the process.[5] There must be some act done or word spoken in court in connection with the case.[6]

§ 1359. **Sunday or Legal Holiday.**— Service of process on Sunday or upon a legal holiday is clearly irregular, and may be pleaded in abatement or set aside on motion. But when the case has been allowed to go to judgment by default, on such irregular service, the judgment will neither be held void nor reversible on account of the irregularity.[7]

[1] Dungan *v.* Miller, 37 N. J. L., 182; Huddeson *v.* Prizer, 9 Phila., 65.

[2] Baker *v.* Wales, 45 How. Pr., 137; S. C., 14 Abb. Pr. (N. S.), 331; Lagrave's Case, id., 334; Carpenter *v.* Spooner, 2 Sandf., 717; Hevener *v.* Heist, 9 Phila., 274.

[3] Marsh's Adm'rs *v.* Bast, 41 Mo., 493.

[4] Stewart *v.* Hibernia Banking Association, 78 Ill., 596; People *v.* Burton, 65 N. Y., 452.

[5] Simcock *v.* First National Bank of Emporia, 14 Kan., 529.

[6] Rhoades *v.* Delaney, 50 Ind., 468; Steinbach *v.* Lesse, 27 Cal., 295.

[7] Comer *v.* Jackson, 50 Ala., 384.

§ 1360. **Reference to Other Chapters.**— Defects most frequently occur in the constructive service of process, especially when it is by publication in a newspaper. Many instances of defective service also arise in notifying parties to bills and notes of the dishonor of such paper. The sufficiency or insufficiency of the service of original process and other notices used in practice will necessarily be rendered manifest by the *return* of the officer or other person by whom the service is made, and will accordingly be considered in the next succeeding part of this chapter. To avoid useless repetition and reiteration of authorities, the reader is referred to the chapters and parts of chapters where those topics are separately treated.[1]

[1] See ch. I, part II; ch. XI; ch. X, part IV; *post*, part VIII.

VIII. The Return.

§ 1361. General Remarks.
1362. Nature and Purpose of Return — Form and Sufficiency.
1363. When Name of Officer Not Used.
1364. When Service Without the State.
1365. Should Show Compliance with Statute.
1366. To the Proper Term.
1367. Contents of Return.
1368. Further Illustration.
1369. Immaterial Errors.
1370. Defects Cured by Recital in Judgment.
1371. Judgment by Default on Insufficient Return, Void.
1372. Examples of Defect Fatal to Judgment.
1373. Return Contradicted by Record.
1374. Examples of Defective Returns.
1375. What Deemed Sufficient.
1376. When Served on Officer of Corporation.
1377. Inference from General Language of Return.
1378. Return Cannot be Contradicted.
1379. Exceptions to Above.
1380. Presumptions in Favor of Return.
1381. May be Amended.
1382. Aided by Presumption.
1383. Aided by Parol Evidence.
1384. Aided by Contents of Bill.
1385. Conflicting Views as to Impeaching Return.

§ 1361. General Remarks.— The importance of the return, by which the sufficiency of the service is usually tested, is second only in importance to the service itself. Being a ministerial duty which frequently devolves upon an ignorant, irresponsible deputy, its careless execution is often fruitful of vexatious and expensive delays in the administration of justice, and where it accurately recites an antecedent failure of duty in not properly serving the process, may drive the party injured by the neglect to further litigation, in order to recover the ground lost through official negligence or incapacity.

§ 1362. Nature and Purpose of Return — Form and Sufficiency.— The object and purpose of the return is to

prove the service of the paper returned. The return should be in writing; but, as will be seen in another place, this is not an inflexible rule.[1] When written, it must be signed by the person making the service, and if by a deputy should be in the name of the officer for whom he acts, by the deputy; for the law does not recognize, nor the courts take notice of, the acts of a deputy sheriff, marshal or constable, except as the acts of his superior.[2] And where the record, after judgment, showed a return of original process, made in the name of the deputy instead of the sheriff himself, the judgment was declared void.[3] When, however, the service is within the county, by the sheriff, in signing the same it is not necessary that his name and title should be followed by the name of the county within which he acts officially. The court will be presumed to know its own officers.[4]

§ 1363. When Name of Officer Not Used.—This rule, however, applies only to deputies who act for and under the directions of a duly commissioned officer. When, to meet an emergency, it becomes necessary for the court to appoint a *special* deputy or *elisor*, the necessity for the employment of the regular officer's name ceases, and the return is made in the name of the special officer, by whom the notice is served.[5] When, as is frequently the case, the notice is served by a person who acts in no official capacity whatever, but performs the functions of an officer in serving notice, at the request of one of the parties, it is necessary that the return should be verified by his affidavit, and such affidavit should accompany the return.[6] And when a return so verified is filed with the clerk of the court, it is so favorably regarded that it will, at least, be held to satisfactorily

[1] See *post*, § 1383.
[2] Bolard *v.* Mason, 66 Pa. St., 138.
[3] Rowley *v.* Howard, 23 Cal., 401.
[4] Chittenden *v.* Hobbs, 9 Iowa, 417; Davis *v.* Burt, 7 id., 56.
[5] Glencoe *v.* People, 78 Ill., 382.
[6] Coffee *v.* Gates, 28 Ark., 43; State Bank *v.* Marsh, 10 Ark., 129.

establish the fact of service, until the same is denied in an equally solemn manner, though such sworn return may be lost or mislaid by the clerk.[1]

§ **1364. When Service Without the State.**— When there is personal service of notice outside of the state from whose court the same issues, the return should be verified; for the reason that, by whomsoever the paper is served, whether an officer or a private person, it must be regarded where the notice is returnable as an unofficial act. If the service is by the sheriff of the court, it cannot be proved by his unsworn certificate, because the act was performed where his official character was not recognized. And if it be served by any other sheriff or officer, who is not an officer of the court, verification is necessary, because the service is by one who is unknown in the court where his certificate is offered.[2]

§ **1365. Should Show Compliance with Statute.**— Where jurisdiction depends upon the service of notice, it is necessary that the statute by which the proceeding is authorized should be closely followed, and that the return should show a substantial compliance with its requirements, in all essential particulars.[3] The time of service should be correctly stated, and where a return stated that the notice had been served at "11 M.," it was held defective and the service to be set aside on motion made for that purpose.[4]

§ **1366. To the Proper Term.**— The original process when served should be returned to the proper term; but if the time of holding the court be changed by statute after

[1] Estate of Robinson, 6 Mich., 137. The service of notice of appeal may be proven by affidavit in the appellate court. It has been held of no consequence that the record failed to show service of such notice, when it was supported by the affidavit of the person serving the same. Mendioca *v.* Orr, 16 Cal., 368.

[2] It should appear by the return that the service was had at a place within the limits prescribed in the act. Fisher *v.* Fredericks, 33 Mo., 612.

[3] Bendy *v.* Boyce, 37 Tex., 443.

[4] Hodges *v.* Brett, 4 Green (Ia.), 345; Milbourn *v.* Fouts, id., 346.

the issuance of the summons, without requiring such writs to be returned for correction, they should be returned to the next subsequent term.[1] Unless the return day is changed by statute, it remains as fixed by law. Any alteration made by the court or clerk will not authorize a return at a different time than that prescribed.[2]

§ **1367. Contents of Return.**— What the written return should contain depends of course upon the manner and mode of service; but whatever mode is adopted, the return should state the facts in detail. It is not sufficient to employ the word "due" to express to the satisfaction of the court that the duty has been properly executed. "Due service," and "duly served," when used in the return of legal process, mean nothing, because they come from an officer not supposed to use them advisedly, as they are expressive of a conclusion of law. The sheriff, when he returns that the paper has been *duly* served, assumes the province of the court in attempting to determine what amounts to valid service. The manner of serving the process should be described so that the court may be able to judge of its sufficiency.[3] A return which undertook to state all the necessary facts in the single word "executed," was held insufficient.[4] But it was held in one case that the words "Received in office, August 22, 1870," and "Executed August 22, 1870," followed by the sheriff's name and title, and copied into the transcript immediately after the summons and complaint, in the absence of objections in the trial court, showed a sufficient service which could not be questioned after judgment by default.[5] This case is certainly not in harmony with the majority of those where the same question is considered, for the reason that the return does not recite facts sufficient to enable the court to judge of the sufficiency of the serv-

[1] Freeman *v.* Thompson, 53 Mo., 183.
[2] Crowell *v.* Galloway, 3 Neb., 215.
[3] Botsford *v.* O'Connor, 57 Ill., 72.
[4] Merritt *v.* White, 37 Miss., 438.
[5] Lenoir *v.* Broadhead, 50 Ala., 58.

ice. However, another case from the same court is scarcely less at variance with the current of authority.[1] There it was decided that a subpœna issuing out of a court of chancery, directed to all the defendants, and returned "Executed on the parties, this October 1, 1870, with copy," sufficiently showed a proper service of the process.

§ 1368. Further Illustration.— The recital on a return — "Executed by delivering a true copy," with the date, is certainly fuller and more complete in its recitals than either of the two foregoing, and yet this was held insufficient.[2] But where the return was in the words following: "Executed on the within-named J. J. M. this October 12, 1870, by *personal* service; copy waived;"[3] or, "Executed 31st March, 1859, by delivering to the defendant a true copy of this writ, together with the certified copy of petition,"[4] in both these cases it was held to be sufficient, because there was such a description of the manner of executing the process that the court was enabled to determine whether the defendant had been properly served.

§ 1369. Immaterial Errors.— A trifling variance, such as is not calculated to mislead, between the writ and the return, would not be sufficient to vitiate the latter. As where the original notice was against "Luther Burt," and the return was of service on "L. Burt," the difference was held immaterial.[5]

§ 1370. Defects Cured by Recital in Judgment.— It has been held that a recital in the judgment or decree, of due service of process upon the defendant, is sufficient to cure all defects in the service and return, of which advantage was not taken at or before the trial, by objecting to the irregularity.[6] In other words, that the judgments cannot

[1] Florence *v.* Paschal, 50 Ala., 28.
[2] Woodliffe *v.* Connor, 45 Miss., 552.
[3] Milam *v.* Strickland, 45 Miss., 721.
[4] Hill *v.* Grant, 33 Tex., 132.
[5] Davis *v.* Burt, 7 Iowa, 56; Johnson *v.* Jones, 2 Neb., 126.
[6] Morrow *v.* Weed, 4 Iowa, 77, 87, and cases cited.

be attacked collaterally, on account of irregularity in the process, provided it appeared from the record that any process at all had been served. This doctrine, which seems to be evolved by a sort of circular reasoning, where premises and conclusion are constantly changing places, is maintained in the interest of the finality of judgments. It is said that the record shows due service, and even though the judgment was by default, the presumption is that the question of service and return of process were submitted to the court and passed upon. The record declares that the defendant was properly served. Consequently, that fact cannot be collaterally denied. But the jurisdiction of the court to make a record in the case depends upon the service of process. This requirement is met by the assertion that jurisdiction is shown by the record. So the service of process makes the record, and when this fails, the record may make itself by assuming the facts upon which its existence depends. The court has no jurisdiction to hear and determine the issues between parties litigant until the defendant has been duly served with process; yet, without due process, the court may decide, as a matter of fact, that process has been duly served, and upon the jurisdiction thus assumed render judgment against defendant, of which he has no notice, and consequently cannot appear and attack it by a direct proceeding until, perhaps, it is too late. This is the unfortunate position the defendant would occupy in a case where the service was otherwise than strictly personal, and the return correctly stated the manner in which the process was served.

§ **1371. Judgment by Default on Insufficient Return, Void.**— Jurisdiction has been fairly described as the power of the court to act upon a given state of facts, and when such facts are properly alleged before it, and *the parties are properly notified*, to decide whether they exist; and the judgment upon them is conclusive until reversed by a direct proceeding.[1] But when any other mode of obtaining juris-

[1] Wanzer *v.* Howland, 10 Wis., 8, 16.

diction of the person is substituted for personal service, the statutory method must not only be followed in every essential particular, but, unless the return affirmatively shows this, any judgment rendered against the defendant by default should be treated as a nullity.[1] So, where a rule of court, having the force of a statute, required the return to show that a copy of the summons was delivered to the defendant, or, in case of his absence, was left with a member of his family, etc., it was held that, before a service made by leaving a copy of the summons with any one else than the defendant himself could be held valid, it must affirmatively appear from the return that the person serving the process could not find the defendant.[2]

§ 1372. Example of Defect Fatal to Judgment.— In order to sustain a judgment *pro confesso*, the return of process, served by leaving a copy with another person, must show that the officer informed the person with whom the copy was left of the contents thereof.[3] The return should also show the place where the service was made, and in case of judgment by default, an omission in this respect will not be supplied by any legal presumptions in favor of jurisdiction.[4] In the case of Pollard *v.* Wegener,[5] the importance of the return as a part of the record is fairly illustrated, and the doctrine of the nullity of judgments founded upon insufficient service is ably maintained. In that case the governing statute required that every subpœna or process for appearance should be served by giving the defendant "a copy thereof, or by leaving a copy thereof at the dwelling-house or usual place of abode of the defendant, with

[1] Pollard *v.* Wegener, 13 Wis., 569; Knox *v.* Miller, 18 Wis., 397; Rape *v.* Heaton, 9 Wis., 328.

[2] Matteson *v.* Smith, 37 Wis., 333; Northrup *v.* Shephard, 23 Wis., 513.

[3] Tompkins *v.* Wiltberger, 56 Ill., 385.

[4] Sayles *v.* Davis, 20 Wis., 302. The service being by one not an officer of the court, the return was held defective for not stating that copy was left at a place within the jurisdiction. See, also, Pigott *v.* Snell, 59 Ill., 106.

[5] *Supra*, § 1371.

some person of the age of ten years or upwards, to whom the nature of such process shall be explained." The record of a suit for divorce, the decree in which was collaterally called in question, recited that, "It further appearing that said subpœna was duly served upon said defendant by the sheriff of said county more than ten days before the return day thereof," etc. The return of the officer was, as appeared by the record, in the following words: "I hereby certify that I duly served the within subpœna by leaving a true copy thereof at the defendant's last and usual place of residence, in said county, this —," etc. The return failed to state either that the copy was left with a person of the prescribed age, or that the contents of the copy were explained to the person with whom the same was left; both of which were important requirements.[1] There was no appearance in response to the subpœna, and a decree was rendered for plaintiff, dissolving the bonds of matrimony and directing defendant to reconvey to plaintiff certain real estate conveyed by plaintiff to her in consideration of the marriage. It was the latter part of the decree that was questioned in the case cited, which was an action of ejectment between the divorced wife and the grantee of the husband, who claimed title under the decree. Dixon, J., in rendering the opinion, said, referring to the earlier case of Rape *v.* Heaton:[2] "The broad and rational doctrine that we may, in all cases where a decree or judgment is relied upon as the foundation of a legal right, inquire into the facts which by law are made necessary to the jurisdiction of the court or tribunal by which it was pronounced, and if it appears that such facts did not exist, disregard such decree or judgment as unauthorized and void, is there asserted, and, as we think, maintained by a process of reasoning which cannot well be answered. * * * Hence, the recitals contained in the record before us, that the plaintiff in error was duly served with process of subpœna in the action for a divorce,

[1] Hendley *v.* Baccus, 32 Tex., 328; Vandiver *v.* Roberts, 4 W. Va., 493.
[2] *Supra*, § 1371.

are not now, and could not, if the record were silent as to the manner of the attempted service, be conclusive of the fact that she was so served. For until the court, by a proper service of process, had jurisdiction of her person, it was powerless to bind or conclude her upon that or any question which might arise in the action."[1]

§ **1373. Return Contradicted by Record.**— In this case, the record invoked in support of the title of the husband's grantee bore upon its face the evidence of its own deficiency. Its recital of due "service" was flatly contradicted by that portion of the same record where the return was set out; but the court goes farther in declaring the rule, that even when the record does not disclose the manner of service, it may be otherwise shown, and the judgment thereby invalidated.

§ **1374. Examples of Defective Returns.**— Where the language of the return was that there was "delivered," etc., "a copy of this writ, and a copy of the petition," without stating what petition, the return was held insufficient.[2] So where it merely shows that the copy was left at a particular place, without stating to whom the same was delivered.[3] And where it was expressed in the following words: "Executed by personal service; or, executed on defendant in person," the return was held defective for not showing the delivery of copies as required by statute.[4]

§ **1375. What Deemed Sufficient.**— Where the statute required the service of process, by leaving a copy thereof posted at the front door of defendant's usual place of abode, it was held that the return must not only state that a copy was posted at such front door, but that it was *left posted* there.[5] But where the language of the return was "exe-

[1] Pollard *v.* Wegener, 13 Wis., 572–78.

[2] Tullis *v.* Scott, 38 Tex., 537.

[3] Melvin *v.* Clark, 45 Ala., 285. See, also, Rankin *v.* Dulaney, 43 Miss., 197.

[4] York *v.* Crawford, 42 Miss., 508; Davis *v.* Patty, id., 509.

[5] Lewis *v.* Botkin, 4 W. Va., 533.

cuted personally with original and copy, defendant claiming such," it was held sufficient.[1] So, also, where the return was in the words, "delivered a copy to defendant in person."[2] In brief, what is required of the return is, that it shall contain a *true* and *full* recital of the acts of the officer done and performed in serving the process. The order in which the facts are stated is immaterial, provided everything requisite appears in the return. Whatever is omitted therefrom will be presumed not to have been done by the officer, in making the service.[3]

§ 1376. When Served on Officer of Corporation.— When the adverse party to the proceeding is a corporation, the return should state the name of the officer upon whom the service was made. It will not be sufficient if it merely recites that the corporation was served.[4] But when the proper officer of a corporation to be served was the president, and the return recited that the cashier was served instead, and as an excuse for the substitution stated that the president was not to be found in the county where the suit was brought, such return was held to be sufficient evidence of proper service.[5]

§ 1377. Inference from General Language of Return.— Where the return of service in a case arising under the chancery practice was in the words, "Served the within named by leaving a true copy with the within named," there being several persons mentioned in the subpœna who were to be served, it was held that the court would infer from the language used in the return that a copy was delivered to each of the defendants mentioned in the process.[6]

§ 1378. Return Cannot be Contradicted.— In general, the return of the officer cannot be contradicted by the par-

[1] Presley *v.* Anderson, 42 Miss., 274.

[2] Carter *v.* Daizy, 42 Miss., 501.

[3] Mitchell *v.* Greenwald, 43 Miss., 167; Moore *v.* Coats, id., 225; Naron *v.* Gwin, id., 346; Rankin *v.* Dulaney, 43 Miss., 197.

[4] Grand Tower Mining, etc., Co. *v.* Schirmer, 64 Ill., 106.

[5] Reed *v.* Tyler, 56 Ill., 288.

[6] Greenman *v.* Harvey, 53 Ill., 386.

ties. As it is made, it will be held, in most cases, as conclusive upon both plaintiff and defendant until amended.[1] At least, it is held that it cannot be collaterally impeached, but resort must be had to a direct proceeding for that purpose.[2]

§ 1379. **Exception to Above.**— However, in one case where the return showed due service by leaving a copy of the summons, etc., at the usual place of abode of defendant, when, in fact, such process was left at the residence of his father, and defendant heard of the judgment against him only at the next succeeding term, when he moved to have it vacated; upon proving that he had not received notice of the suit until after judgment, it was held that such judgment should have been vacated.[3] And in another case, where the return was called in question, it was held that the court might hear evidence, and decide whether or not the place at which the service was made was defendant's residence.[4] So, where suit was brought on a judgment rendered in the court of a foreign state, and the return recited that the defendant was personally served with process, it was held that the defendant might show, in direct contradiction of the record, that he was not so served, and thereby invalidate the judgment upon which the suit was brought.[5]

§ 1380. **Presumptions in Favor of Return.**— But the recital in the officer's return, that the summons was personally served, makes more than a mere *prima facie* case in favor of the validity of a judgment rendered in pursuance thereof. The presumptions in favor of its correctness are so great that it requires the *strongest kind of evidence* to overcome the effect of the simple statement in the return, show-

[1] Rowell *v.* Klein, 44 Ind., 290; Johnson *v.* Jones, 2 Neb., 126.

[2] Mueller *v.* Bates, 2 Disney (Ohio), 318.

[3] Dasher *v.* Dasher, 47 Ga., 320.

[4] Bond *v.* Wilson, 8 Kan., 228.

[5] Knowles *v.* Gaslight & Coke Co., 19 Wall., 58; Thompson *v.* Whitman, 18 Wall., 457.

ing good personal service. It is not subject to rebuttal by the same evidence as any statement of a witness, or allegation in the pleadings.[1]

§ 1381. **May be Amended.**— Where anything is by mistake or inadvertence omitted from the return, which is essential to give binding force to the judgment, it may be supplied by amendment.[2] And such amendment may be made in order to make the return consistent with the facts, even after the expiration of his term of office.[3] Neither is the power of amendment limited to the time before the rendition of judgment, but the return may be so amended as to conform to the facts, afterwards.[4] Permission, when granted, to amend the return on a notice, does not go to the extent of authorizing the officer to alter or amend the notice itself. As where it was a notice of motion with a blank space left therein for the day of the next term on which the motion would be made, and for the name of the mover, these blanks could not be filled on pretense of amending the return.[5] It may be proper to remark that notice of the application to amend a return is generally required. Not so, however, when both parties, or their attorneys, are present in court when the application is made.[6]

§ 1382. **Aided by Presumption.**— The return of service of notices, and even of original process, may be aided in divers ways besides amendment, when upon its face it does not appear sufficient to warrant the proceeding noticed. An instance of this kind is where, in a suit pending in the United States court against a corporation, which might, under authority of an act of congress, be served through one of its directors, and it appeared from the return only that the marshal had served the process upon S., "reported

[1] Davant *v.* Carleton, 53 Ga., 491; Starkweather *v.* Morgan, 15 Kan., 274.

[2] Toledo, etc., R. R. Co. *v.* Butler, 53 Ill., 323.

[3] McClure *v.* Wells, 46 Mo., 311.

[4] Kirkwood *v.* Reedy, 10 Kan., 453.

[5] White *v.* Sydenstricker, 6 W. Va., 46.

[6] National Insurance Co. *v.* Chamber of Commerce, 69 Ill., 22.

to be one of the directors," etc., and it being shown by the record, on error, that S. was at a previous time one of the directors, the court presumed, in the absence of evidence to the contrary, a continuance of the relation of director, from the time shown by the proof, down to the time of service, and accordingly overruled the objections to the return.[1]

§ **1383. Aided by Parol Evidence.**— So when the return is lost, the service may be proven by parol evidence.[2] And when the return fails to state all the facts necessary to a good and sufficient service, to prevent a failure of justice, the service has been permitted to be shown in any other manner to the satisfaction of the court.[3]

§ **1384. Aided by Contents of Bill.**— So also, where the return recited that the process was "executed on S. S., executor, Mrs. J. L. S., executrix, by offering to each a copy, and on Miss F. R. S. (and other minors) by handing each a copy," and it was necessary that the guardian of the minors should be served, the above return was held to show sufficient service, it appearing from the bill that Mrs. J. L. S. was such guardian.[4]

§ **1385. Conflicting Views as to Impeaching Return.**— It seems strange that, in the principal suit, the return of the officer cannot be questioned or doubted, if he refuses to amend, yet after judgment, the entire judicial proceeding, which is based upon such return, may in defense to an action thereon, or by motion to set aside, be utterly overthrown and invalidated, by showing the falsity of its recitals. This is the rule, however, which seems to be established by judicial decisions.[5]

[1] Railroad Company *v.* Brown, 17 Wall., 445.
[2] Bridges *v.* Arnold, 37 Iowa, 221.
[3] Kip *v.* Fullerton, 4 Minn., 473.
[4] Smith *v.* Pattison, 45 Miss., 619.
[5] *Supra*, § 1378–9, and cases cited.

IX. Pleading.

§ 1386. Division of Subject.
1387. Necessary to Aver Notice.
1388. Action on Guaranty.
1389. When Notice Unnecessary.
1390. When Facts Are Within Defendant's Knowledge.
1391. Knowledge Lies Between the Parties.
1392. When Want of Notice to be Averred.
1393. Manner of Alleging Notice.
1394. Must Aver Notice to Proper Party.
1395. Should Show Strict Compliance When Constructive Service.
1396. In Due Time and to Proper Person.
1397. Waiver or Excuse.
1398. Facts Pleaded According to Legal Effect.
1399. Manner of Averring Want of Notice.
1400. Admission of Notice by Answer.
1401. Consequence of Defective Pleading.
1402. Practice Under the Code.

§ 1386. Division of the Subject.— The first question for consideration under this branch of our subject is — when is it necessary to aver in the pleadings that notice has been given? *Second*, when should the pleader aver *want* of notice? *Third*, how should either notice, or its absence when necessary, be averred; and *Fourth*, how may advantage be taken of either a defective allegation in this respect, or an entire omission of the averment, when it is material to the issue?

§ 1387. Necessary to Aver Notice.— The affirmative allegation devolves upon the plaintiff, when the event upon which the defendant's duty arises and the plaintiff's right accrues lies peculiarly within the knowledge of the latter, and the action does not lie without notice given.[1] As where the action was on a promise to pay such a rate for certain wares as any other person would pay, it was held that defendant was entitled to notice, before suit, of the rate that another gave, and the declaration should have contained an allegation of such notice.[2] So where suit was

[1] 6 Com. Dig. Pleader (C., 73).

[2] Henning's Case, 2 Croke, 432; Harris *v.* Ferrand, Hardres, 36.

brought on a contract to deliver so much corn, *if the plaintiff approve of it at the fair*, it was held that defendant was entitled to notice of approval, for, until the corn was approved, the contract was in abeyance, and it was uncertain whether defendant would be required to execute it on his part; hence notice of such approval should be averred.[1] So also, in case of a subscription of stock, to be paid when $5,000 had been raised for a specified purpose, it was held that notice was necessary to fix the liability of the subscriber, as the circumstances on which the performance of the contract depended were more peculiarly within the knowledge of the promisee than the promisor.[2] It was also decided, where defendant had agreed to reimburse plaintiff for the expense of a trip to England, in case plaintiff's sales of certain machines did not amount to sufficient to defray the same, that in an action to recover the amount of such expense, notice to the plaintiff of the deficiency in the sum realized from the sales of machines should have been averred.[3] So in an action against the drawer or indorser of a negotiable instrument, it is necessary to allege demand and notice, or such facts as will excuse notice.[4]

§ 1388. Action on Guaranty.— In an action brought on a guaranty, it is not only incumbent upon the plaintiff to aver notice of the fact which fixes the liability of the guarantor, but it is necessary to allege notice of the acceptance of the guaranty, by which he became contingently liable for the default of the other party.[5] The necessity of this averment is placed upon somewhat different grounds from

[1] Brable *v.* Hollywell, 1 Croke, 250; Palgrave *v.* Windham, 1 Str., 212.

[2] Chase *v.* Sycamore & C. R. R. Co., 38 Ill., 215.

[3] Watson *v.* Walker, 23 N. H., 471. For cases where averment of notice is held unnecessary, see Rex *v.* Holland, 5 T. R., 607, Lent *v.* Padleford, 10 Mass., 230; Clough *v.* Hoffman, 5 Wend., 499; East *v.* Thoroughgood, 1 Croke, 834.

[4] Shultz *v.* Depuy, 3 Abb. Pr., 252; Harker *v.* Anderson, 21 Wend., 372; 1 Chit. Pl., 329, and cases cited.

[5] McCollum *v.* Cushing, 22 Ark., 540; Kincheloe *v.* Holmes, 7 B. Mon., 5.

that required in the cases hereinbefore cited; as in most of those cases, the notice advised the obligor of a liability incurred under a contract of which he already had notice, while the notice to the guarantor is essential to complete the contract of guaranty itself. The averment of a notice of acceptance, however, is not all that is required in actions of this kind. When the guarantor is entitled to notice of the principal debtor's failure to pay, and that proper efforts have been made to collect the debt from him, the declaration should contain proper averments to this effect.[1]

§ 1389. When Notice Unnecessary.— But an unconditional covenant to pay immediately on a failure of a debtor to discharge the obligation at the time stipulated is not such a guaranty as requires notice.[2] A distinction has also been drawn between contracts to guarantee the payment of money, or the performance of some duty where the principal obligation remained in abeyance until the acceptance of the guaranty, and an unconditional guaranty indorsed upon a written contract which was in itself complete at the time, conditioned that the guarantor should be bound to pay a specific sum mentioned, upon the failure of the principal obligor in the contract to faithfully perform its conditions. In suits on collateral obligations of the latter description, it has been held that as the acceptance of the principal contract necessarily involved the acceptance of the guaranty, notice of such acceptance was not requisite.[3]

§ 1390. When Facts Are Within Defendant's Knowledge.— Notwithstanding the conditional nature of the obligation under which defendant's indebtedness accrues, if the facts and circumstances upon which his liability to plaintiff depends are as much within his knowledge as that of the

[1] Sylvester *v.* Downer, 18 Vt., 32; Bebee *v.* Moore, 3 McLean, 387; *ante*, § 390 *et seq.*

[2] Williams *v.* Springs, 7 Iredell, 384; Kemble *v.* Wallis, 10 Wend., 374; Williams *v.* Granger, 4 Day, 444; *ante*, ch. VII, part II.

[3] Davis Sewing Machine Co. *v.* Jones, 61 Mo., 409; *ante*, ch. VII, part II.

plaintiff, or he has the means of informing himself in regard to such facts and circumstances from a definite known source, other than by information from the plaintiff, he is not entitled to claim notice from the plaintiff,[1] and consequently, in such case, an averment of notice would be unnecessary. As when the obligor assumes to pay when A. marries, returns into the kingdom, or performs a certain journey. Here the liability depends upon the act of a third party, which lies in the defendant's cognizance as well as the plaintiff's, and he is bound to take notice at his peril.[2] So if he assumes to pay so much as A. shall name; to pay if A. does not pay; or to pay so much for every acre above twenty, where A. measures them, it has been held that notice would not be required before suit.[3] So, also, in an action for services rendered, it is never deemed necessary to give notice to defendant of the rendition of such services.[4]

§ 1391. Knowledge Lies Between the Parties.— When the cause of action arises upon the performance of some act alleged to have taken place between the parties themselves, there is the strongest reason for dispensing with notice from the obligee to the obligor. As where the action was debt for freight, on a charter-party, and the goods were obliged to have been delivered to the defendant himself, it was held that plaintiff need not aver notice of the delivery.[5]

§ 1392. When Want of Notice to be Averred.— It will probably be sufficient to state that the want of notice should be pleaded in every proper case in which it is omitted and the declaration does not show upon its face that notice was necessary. To undertake to illustrate by examples what are proper cases, would merely be to go over the ground already traversed in endeavoring to show when

[1] Lamphere *v.* Cowen, 42 Vt., 175; Dix *v.* Flanders, 1 N. H., 246; Hobart *v.* Hilliard, 11 Pick., 143.

[2] Com. Dig. Pleader, C., 75; Normanvill *v.* Pope, 2 Cro., 137.

[3] Com. Dig. Pl., C., 75; Burnel *v.* Wood, 2 Roll., 22.

[4] Wilson *v.* School Dist. No. 4, 32 N. H., 118.

[5] Dodd *v.* Atkinson, cited Com. Dig. Pl. (C., 75).

notice should be averred, and when its averment was unnecessary.

§ 1393. **Manner of Alleging Notice.**— In discussing the manner of pleading *notice* or *want of notice*, it will be necessary to show what constitutes a good and sufficient notice, for it is only by alleging with reasonable particularity the facts constituting such notice as the case requires, that the matter may be brought properly before the court or jury. Especially under the code should *facts* be pleaded as contra-distinguished from conclusions of law. The pleading would therefore be insufficient on its face if it merely alleged that "lawful notice" or "notice as required by law" was given, without stating to whom the same was given, or without alleging sufficient to show that the notice was reasonable in point of time. As where a bill of sale in the nature of a mortgage was given with a stipulation for the mortgagor to retain possession, and that it was to be void if the sum secured was paid on a specified day, unless the mortgagee gave notice of his desire for earlier payment, when the same should be paid at the time for which the notice was given, or possession was to be surrendered. Notice of demand for earlier payment was alleged as having been given on the same day the possession was demanded, without stating the hour, and the averment was held insufficient, for the reason that it could not be deduced therefrom that the notice was reasonable.[1] So if A. promises to pay to B., before the end of a fair, as much as B. disburses at such fair, in an action by B. on such promise he ought to allege notice given of such disbursements, before the end of the fair, otherwise he will be too late.[2]

§ 1394. **Must Aver Notice to Proper Party.**— It should also appear, either by direct averment or necessary intendment, that the alleged notice was given to the proper party. As, for example, where the action is on a breach of condition to repair, upon notice, the allegation should be that

[1] Rogers *v.* Mutton, 7 Hurl. & Nor., 733.
[2] Com. Dig. Pl., C., 74.

such notice was given to him who had the entire interest in the premises, and not to an under lessee.[1]

§ 1395. Should Show Strict Compliance When Constructive Notice.— When any other form of service is substituted by statute for that of personal delivery to the party to be affected, the pleading should show a strict compliance with such statutory form. As where service by mail was authorized by statute, it was held that it must appear by the pleading that the notice was deposited in the postoffice, directed to the party, his agent or attorney, at his place of residence, with full postage paid thereon. The allegation that it was "mailed" would not be sufficient.[2]

§ 1396. In Due Time and to Proper Person.— It has been held, however, under the common law practice, in a suit on a bill against the indorser, that a general allegation of notice of demand and refusal would be sufficient.[3] But it is laid down as a rule by the highest authority upon common law pleading, that "it ought to appear that notice was given in due time and to a proper person."[4] It is also declared that where no notice whatever has been given, the absconding of the party, or other circumstances, should be stated as an excuse for the want of notice. And even where there has been a justifiable delay in giving the notice at the regular time, though sometimes the facts excusing the delay are allowed to be given in evidence under the averment that notice was given, it is regarded as the better practice to state the facts of the excuse.[5] This rule is more explicitly laid down in cases decided under the codes of practice of several of the states, and is generally followed wherever the code has been adopted.

§ 1397. Waiver or Excuse.— In an action against the indorser of a note, under an allegation of demand and no-

[1] Stewton *v.* Cushe, Yel., 37.
[2] Clark *v.* Adams, 33 Mich., 159.
[3] Boot *v.* Franklin, 3 Johns., 207.
[4] 1 Chit. Pl., 328.
[5] 1 Chit. Pl., 328-9.

tice, it was held that the plaintiff could not introduce evidence tending to prove the absence of the indorser, as an excuse for not giving such notice. The grounds of excuse upon which plaintiff relied were regarded as facts *constitutive of his cause of action*, and, therefore, such as it was necessary to allege in order to lay a foundation for the evidence.[1] So, in England, it is a rule of pleading that a waiver of notice made before dishonor, or other facts excusing notice of the dishonor of commercial paper, cannot be proved under an allegation of due notice.[2] Some of the earlier cases in this country, especially in Massachusetts and Connecticut, have decided the question the other way, and admitted evidence of waiver of notice, or in excuse for the want of notice, under an allegation that notice was given.[3] But in the former state, where this manner of pleading was recognized in cases involving notice of the dishonor of bills and notes, in one case it was regarded as exceptional, and not applicable to other executory agreements.[4] The conflict upon this question is not confined to the courts, but there seems to be a difference of opinion between the text-writers as to which is the rule in the United States. Mr. Daniel, in his recent work on Negotiable Instruments, regards the established doctrine as being in harmony with the Massachusetts cases cited,[5] while Mr. Edwards, who may

[1] Pier *v.* Heinrichoffen, 52 Mo., 333. See, also, Garvey *v.* Fowler, 4 Sand., 665; Shultz *v.* Depuy, 3 Abb. Pr., 252; Lumbert *v.* Palmer, 29 Ia., 104; Cole *v.* Wintercost, 12 Tex., 118; Curtis *v.* State Bank, 6 Blackf., 312.

[2] Burgh *v.* Legge, 5 M. & W., 418; Murray *v.* King, 5 B. & Ald., 165; Allen *v.* Edmundson, 17 L. J., N. S., Exch. of Pl., 291; S. C., 2 Exch., 719.

[3] City Bank *v.* Cutter, 3 Pick., 414; Taunton Bank *v.* Richardson, 5 id., 436; Jones *v.* Fales, 4 Mass., 245; North Bank *v.* Abbot, 13 Pick., 465; Harrison *v.* Bailey, 99 Mass., 620; Kent *v.* Warner, 12 Allen, 561; Norton *v.* Lewis, 2 Conn., 478; Camp *v.* Bates, 11 Conn., 488; Windham Bank *v.* Norton, 22 Conn., 213. See, also, Williams *v.* Mathews, 3 Cow., 252; Ogden *v.* Cowley, 2 Johns., 274.

[4] Colt *v.* Miller, 10 Cush., 51.

[5] 2 Daniel, Negot. Inst., § 1048.

be looked upon as a thoroughly competent exponent of the practice under the New York code, declares that, in pleading notice, "the complaint must state the facts constituting the cause of action on which plaintiff seeks to recover." A waiver of notice cannot be proved under an allegation of due notice.[1] This seems to be in substantial conformity to the spirit of any system of pleading, which requires a statement of *facts*, and not *conclusions of law*.

§ 1398. Facts Pleaded According to Legal Effect.— Though it is necessary to plead the facts upon which a party relies, it is neither necessary nor permissible, under any good system of pleading, to state the evidence by which those facts are to be established.[2] Equal care should be observed to avoid, on the one hand, the averment of conclusions of law, while endeavoring to plead facts according to their legal effect; and, on the other, the statement of evidence, instead of the facts to be proved. In pleading notice given to an agent, the averment should be of notice to the principal. It may reasonably be doubted whether an averment of notice to an agent would be sufficient to admit evidence upon that point, against the objection of the other party, unless there were other allegations which would show, not only that it was given to *an* agent, but to *the* agent to whom it might be given so as to bind the principal.[3] Whether the notice be served upon the principal or the agent, the legal effect is notice to the principal. This is the *fact* to be proved. The manner in which it was served is the *evidence*, whether that be by giving it to an agent authorized to receive it or to the principal in person.

§ 1399. Manner of Averring Want of Notice.— An averment of *want of notice* should be no less clear and unambiguous than is required when *notice* is alleged. It must be an averment of an issuable fact not involved in an issue of law. As where the answer was a denial of knowl-

[1] Edw. on Bills, 636.

[2] 1 Chit. Pl., 566.

[3] See *ante*, ch. IX, part II.

edge, information or belief as to whether notice had been given *as required by law*, it was held that this merely raised an issue as to the *lawfulness* of the notice, which was not a proper question to be submitted by the pleadings. The *fact* as to whether notice had been given was lost sight of, and consequently the pleading was bad.[1]

§ **1400. Admission of Notice by Answer.**— But where the answer admits notice, *reasonable* notice will be intended, and the question ceases to be one for the jury, whether the notice was reasonable or unreasonable.[2] A denial of any notice whatever would be sufficiently comprehensive to include any issue upon that question presented by the plaintiff, and would therefore be regarded as sufficient, without entering into particulars. And when the action was brought on a joint contract, an allegation by defendants that notice was not given them would be sufficient without alleging that notice was not given either of them.[3] Although it would doubtless be held otherwise when the contract was both joint and several, or where the obligors were partners, and the transaction was in connection with the business of the partnership.

§ **1401. Consequences of Defective Pleading.**— As to the consequences of defective pleading in cases where averment of notice is necessary, there seems to be no general rule which is universally recognized. Lord MANSFIELD lays down the distinction between the consequences of a *defective averment* and *no averment* of notice thus: The former, he declares, may be cured by verdict, because, to entitle plaintiff to recover, "all circumstances necessary, in form or substance, to complete the title so imperfectly stated must be proved at the trial — it is a fair presumption, after verdict, that they were proved;" while as to the latter he says: "When the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and

[1] Soeding *v.* Bartlett, 35 Mo., 90.
[2] Larabee *v.* Searsport, 42 Me., 202.
[3] Watson *v.* Walker, 23 N. H., 471.

therefore there is no room for presumption."[1] The case cited was an action against an indorser, and the plaintiff failed to allege demand and notice, wherefore it was argued that no proof at the trial could make good a declaration which contained no ground of action on its face, and it was accordingly held that judgment for plaintiff on such a declaration should have been arrested. The doctrine announced by the learned jurist would seem to apply with equal force to actions on contracts of any kind where *notice* was a condition precedent, and consequently necessary to the statement of a cause of action; but Mr. Chitty, in his incomparable work on Pleading, states the English rule under the common law practice in these words: "The omission of an averment of notice will be fatal on demurrer or judgment by default, but may be aided by a verdict, *unless in an action against the drawer of a bill*, when the omission of the averment of notice of non-payment of the acceptor is fatal even after verdict."[2] So in this country substantially the same reasoning employed by Lord Mansfield in support of the doctrine that *defective* or *inaccurate* averments would be cured by a verdict, is put forth to cure an entire *omission* of any allegation whatever.[3] There it was decided that, even where an averment of notice of a condition precedent was necessary, and was omitted, the omission was cured by verdict, because *it was a question involved in the issue, and must be presumed to have been proved, though not alleged.*[4]

§ **1402. Practice Under the Code.**—In those states where the code has been adopted, the practice differs materially from that at common law, and in nothing more than in the manner of stating a cause of action, in the initial pleading. The codes not only differ from the common law practice, but in many particulars differ from each other; but very few, if any of them, leave room for the indulgence

[1] Rushton *v.* Aspinwall, 1 Douglas, 653.
[2] 2 Chit. Plead., 329; id., 681.
[3] Colt *v.* Root, 17 Mass., 229.
[4] Crocker *v.* Gilbert, 9 Cush., 131.

of presumptions by the court as to the proof of facts not alleged in the pleadings. In some of them, at least, the omission of material allegations may be supplied by amendment, to conform the pleadings to the proof. If *notice* is a fact necessary to constitute a cause of action, its omission will affect the case at all its stages, precisely as it would be affected by the omission of any other material averment, want of which would render the pleading demurrable on the ground that it did not state facts sufficient to constitute a cause of action, or a defense to an action.

CHAPTER XIII.

FACTS OF WHICH COURTS TAKE JUDICIAL NOTICE.

§ 1403. A General View of the Subject.
1404. Public Statutes, the Common Law and General Customs.
1405. Foreign Laws and Customs.
1406. Public Treaties.
1407. Public Institutions.
1408. Local Customs, and Special and Private Statutes.
1409. Municipal Ordinances.
1410. Geographical Facts.
1411. Historical Facts, Incorporation of Towns, etc.
1412. Election and Appointment of Officers.
1413. Official Signatures and Seals.
1414. Terms of Court and Judicial Proceedings.
1415. The General Course of Nature.
1416. Scientific and Other Facts of Uniform Occurrence.
1417. Facts Occurring in the General Course of Human Life — The Arts, etc.

§ 1403. A General View of the Subject.— It is not because the matters treated of in this chapter are strictly germain to that of NOTICE, in general, that it is added in the second edition. All other considerations have been subordinated to that of utility; and the numerous complaints made to the author because of the absence of this topic from the first edition have convinced him that many practitioners look here for some light upon this branch of the law. When the court is asked to take judicial notice of a fact, it is not always a simple problem that demands solution. It is not in every instance easy to determine whether the matter is one that comes within the range of judicial notice. The subjects upon which the court is asked to exercise this peculiar power are various and diverse in character, and demand repeated modifications of the rules by which the discretion of the court is governed. There seems, indeed,

to be no general rule which governs all phases of the subject. The classes of facts of which notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific and artistic, in addition to a wide range of matters, arising in the ordinary course of nature, or the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition. The difficulties in the way of determining whether a particular fact belongs to this class are enhanced by the circumstance that though its notoriety has a controlling influence, this is not of itself sufficient. Nor is it necessary that the fact shall be actually known to the court. The judge sitting at *nisi prius* may not be sufficiently informed as to a fact in natural science, or the history of the country, of which he is bound to take notice. He may not even be able to recall, without making special inquiry into the matter, the day of the week upon which a date happened to occur, and yet this may be shown by any available and authentic means, to his satisfaction, and the knowledge thus acquired, without either allegation or proof by ordinary methods, may control his decision. Facts of which the court takes notice may be embraced in instructions to the jury, without invading the province of that body, as triers of questions of fact. That the doctrine is an essential one is beyond question. But the difficulties that arise from the uncertainty of the rules by which it is governed, render it impracticable to point out their application otherwise than by an appeal to examples furnished by the courts.

§ 1404. Public Statutes, the Common Law and General Customs.— The rule is quite uniform that courts will take judicial notice of legislative enactments which are recognized as public acts within the state or territory in which the court is held.[1] Thus, where a public act expressly recog-

[1] Levy *v.* The State, 6 Ind., 281; Parent *v.* Walmsley, 20 Ind., 82; Covington, etc., Co. *v.* Shepherd, 20 How., 227; Prell *v.* McDonald, 7 Kan., 426; Wright *v.* Hawkins, 28 Tex., 452; The State *v.* Jarrett, 17

nizes and amends a private act, courts will take notice of the existence and duties of an officer provided for in the latter.[1] In applying this principle the courts make distinctions between statutes which are denominated "public," whether they are "general" in their application to the entire state or territory, and to all persons therein or not, and those which are private. They accordingly hold statutes judicially noticeable which are, in the common understanding of the terms, "local," or "special," when declared to be "public." Hence, a railroad charter, published with other legislative enactments, was held entitled to notice in this manner.[2] So laws for the government of integral portions of the state, known as municipal charters and the amendments thereto, have been held to be of this class, though they only applied to certain designated localities.[3] The courts will take notice of the date when a statute went into effect, as well as its other provisions.[4] Nor do statutes depend for recognition upon the fact that they were enacted by the governing legislative body of the sovereignty by which the court is established. Thus the courts of the different states are bound to take judicial notice of the

Md., 309; People *v.* Mahaney, 13 Mich., 481; Payne *v.* Treadwell, 16 Cal., 220; Division of Howard County, 15 Kan., 194; Belmont *v.* Morrill, 69 Me., 314; Reed *v.* Wilson, 41 N. J. L., 29; East Tenn., etc., Co. *v.* Gaskell, 2 Lea (Tenn.), 742; Lavalle *v.* People, 6 Ill. App., 157; United States *v.* Jackson, 104 U. S., 41; Elwood *v.* Flannigan, 104 U. S., 562; Hall *v.* Brown, 58 N. H., 93; Madison Co. Com'rs *v.* Burford, 93 Ind., 383.

[1] Lavalle *v.* People, 6 Ill. App., 157.

[2] Hall *v.* Brown, 58 N. H., 93.

[3] Case *v.* Mobile, 30 Ala., 538; Belmont *v.* Morrill, 69 Me., 314; Buell *v.* Warner, 33 Vt., 570; Gordon *v.* Montgomery, 19 Ind., 110; Mac. *v.* Titcombe, 19 Ind., 135; Terry *v.* Milwaukee, 15 Wis., 490; Alexander *v.* Milwaukee, 16 Wis., 247; Janesville *v.* Milwaukee, etc., R. Co., 7 Wis., 484; Davis *v.* Bank of Fulton, 31 Ga., 69; Bretz *v.* Mayor, etc., of N. Y., 6 Rob. (N. Y.), 325; Bevens *v.* Baxter, 23 Ark., 387; Hawthorne *v.* Hoboken, 32 N. J. L., 172; Fauntleroy *v.* Hannibal, 1 Dill., 118.

[4] Attorney-General *v.* Foote, 11 Wis., 14; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind., 275; The State *v.* Bailey, 16 Ind., 46.

laws of congress.[1] This has been so decided in reference to acts fixing the value of coin;[2] authorizing the survey and subdivision of the public lands;[3] the laws providing for assessment and collection of the internal revenue for federal purposes;[4] the act regulating proceedings in bankruptcy;[5] the laws enacted for the government of the District of Columbia;[6] as well as all other acts of a public character, or which are declared so to be. For like reasons of public policy, the federal courts recognize, without allegation or proof, the public acts of the legislatures of the different states.[7] So judicial notice is taken of the common law and general customs of the community in which the court is held. Without special enactment, the law merchant governing the transfer of commercial paper by indorsement will be noticed by the courts, where such law has not been abrogated by statute.[8] Courts have also taken judicial notice of military orders of a general character, within the district where the courts were held, when such orders affected judicial proceedings, and were issued by officers of recognized authority.[9] But when the subject-matter to which

[1] Merrill *v.* Dawson, 1 Hempst., 563; Semple *v.* Hagar, 27 Cal., 163; Dickenson *v.* Breeden, 30 Ill., 279; Wright *v.* Hawkins, 28 Tex., 452; Papin *v.* Ryan, 32 Mo., 21.

[2] Daily *v.* The State, 10 Ind., 536.

[3] Priezer *v.* Exchange, etc., Ins. Co., 6 Wis., 89; Atwater *v.* Schenck, 9 Wis., 160; Semple *v.* Hagar, 27 Cal., 163; Papin *v.* Ryan, 32 Mo., 21; Dickenson *v.* Breeden, 30 Ill., 279.

[4] Kessel *v.* Albetis, 56 Barb., 362.

[5] Mims *v.* Swartz, 37 Tex., 13.

[6] Bayly *v.* Chubb, 16 Gratt., 284.

[7] Elwood *v.* Flannigan, 104 U. S., 562; Griffing *v.* Gibb, 2 Black, 519; Smith *v.* Tallapoosa County, 2 Woods, 574; Fauntleroy *v.* Hannibal, 1 Dill., 118; Jasper *v.* Porter, 2 McLean, 579; Jones *v.* Hays, 4 McLean, 521; Owings *v.* Hull, 9 Pet., 607.

[8] Reed *v.* Wilson, 41 N. J. L., 29; Brandao *v.* Barnett, 12 C. & F., 787; 3 C. B., 519. See, also, Sims *v.* Marryatt, 17 Q. B., 281; *In re* Nesbitt, 2 D. & L., 529.

[9] New Orleans, etc., Canal Co. *v.* Templeton, 20 La. An., 141; Taylor *v.* Graham, 18 La. An., 656; Lanfier *v.* Mestier, 18 La. An., 497; Gates *v.* Johnson County, 36 Tex., 141.

such orders are directed lies beyond the scope of the officer's lawful authority, the courts would not be under any obligation to notice them, further than they might claim attention as facts of general notoriety. It is only of general orders of a restricted class, that courts are required to take notice, even when issued in the line of duty of the commanding officer.[1] They are only so recognized when they are of a character, or issued under such circumstances, as to become laws governing the action of the court. In respect to public statutes, it may be observed that the usual form in which they are brought to the notice of the court is as published by authority. But there is some conflict of authority upon the question whether the journals of legislative assemblies will be judicially noticed. In Alabama they are placed upon precisely the same footing as the printed statutes, and if it appears from the journal of either house that a certain law was not enacted in the manner pointed out by the constitution, the act will be held void.[2] The same doctrine is laid down in Michigan;[3] while in Illinois,[4] Indiana[5] and Kentucky,[6] it is held otherwise. The English courts also refuse to take notice of the journals of the house of commons,[7] while they do take notice of the privileges of the house,[8] and also of its standing orders.[9] They also take notice of royal proclamations,[10] and of the maritime law of

[1] Burk *v.* Miltenberger, 19 Wall., 519.

[2] Moody *v.* The State, 48 Ala., 115. In Iowa the courts take judicial notice of the correct reading of a statute as it appears in the office of the secretary of state. Clare *v.* The State, 5 Iowa, 286.

[3] The People *v.* Mahaney, 13 Mich., 481.

[4] Grob *v.* Cushman, 45 Ill., 119.

[5] Coleman *v.* Dobbins, 8 Ind., 156.

[6] Auditor *v.* Haycroft, 14 Bush, 284.

[7] King *v.* Arundel, Hob., 109.

[8] Stockdale *v.* Housard, 9 Ad. & L., 107; 4 Jur., 70; 3 P. & D., 330. See Burdett *v.* Abot, 5 Dow., 165; 14 East, 1; Burdett *v.* Colman, 14 East, 163.

[9] *Ex parte* Stockbridge Railway Bill, L. R., 2 Eq., 364.

[10] Van Omeron *v.* Dowick, 2 Camp., 44.

nations.[1] The latter would be judicially noticeable in the courts of this country.

§ 1405. Foreign Laws and Customs.— The laws and customs, however, which are generally judicially noticed, either in this country or in England, are those which are enacted or in force in the country under the authority of which the court is held. In states where the common law has been adopted, it will be presumed to be the law of a foreign state also, unless there be allegation and proof to the contrary.[2] And not only will the courts of one state, where the common law prevails, refuse to take notice of a foreign statute by which it is abrogated, but they will, in general, refuse to take judicial notice of a different common law rule from their own.[3] Nor that the statutes of the other state contain different provisions on the same subject.[4] In this respect, however, there is not perfect harmony in the rulings. In Louisiana it has been decided that the court would take judicial notice that certain laws peculiar to that state were not recognized in other jurisdictions.[5]

[1] Chandler *v.* Grieves, 2 H. Bl., 606.

[2] Whitesides *v.* Poole, 9 Rich. L., 68; Trigg *v.* Conway, 1 Houst., 538; Kidd *v.* Manley, 28 Miss., 156; Woodrow *v.* O'Conner, 28 Vt., 776; Bean *v.* Briggs, 4 Iowa, 464; Charlotte *v.* Chouteau, 25 Mo., 465; Cavender *v.* Guild, 4 Cal., 250; Anderson *v.* Anderson, 23 Tex., 639; Faulk *v.* Faulk, 23 Tex., 653; Carey *v.* Cincinnati, etc., R. Co., 5 Iowa, 357; Johnson *v.* Chambers, 12 Ind., 102; Rape *v.* Heaton, 9 Wis., 328; Cutler *v.* Wright, 22 N. Y., 472; Palfrey *v.* Portland, etc., R. Co., 4 Allen, 55; Hoyt *v.* McNeil, 13 Minn., 390; Simms *v.* Southern Express Co., 38 Ga., 129; Condit *v.* Blackwell, 19 N. J. Eq., 193; Mobile, etc., R. Co. *v.* Whitney, 39 Ala., 468; Eastman *v.* Crosby, 8 Allen, 206; Syme *v.* Stewart, 17 La. An., 73; Bliss on Code Pl., § 287, citing Thatcher *v.* Morris, 11 N. Y., 437; Beach *v.* The Bay State, etc., Co., 30 Barb., 433: Nelson *v.* Bridport, 8 Beav., 527; 10 Jur., 871; Bristow *v.* Secqueville, 5 Exch., 275; 19 L. J. Exch., 289; Robards *v.* Marley, 80 Ind., 185.

[3] Houghtaling *v.* Ball, 19 Mo., 84; Wilson *v.* Cockrill, 8 Mo., 7; Billingsley *v.* Dean, 11 Ind., 331.

[4] Phœnix Ins. Co. *v.* Church, 59 How. Pr., 293; Neese *v.* Farmers' Ins. Co., 55 Iowa, 604; Chapman *v.* Colby, 47 Mich., 46; Bradley *v.* Hardin, 73 Ala., 70; Bush *v.* Garner, 73 Ala., 162.

[5] McIlvaine *v.* Legaré, 34 La. An., 923.

There are other exceptions to the doctrine as broadly stated in reference to foreign laws. The manner of proving the statutes of sister states, and the territories of the United States, have been much simplified by legislation, so that the difference between them and domestic statutes is hardly realized, except in the matter of pleading. And for certain purposes it seems that some of the courts, at least, will take judicial notice of the statute of a neighboring state, so that it need not be either pleaded or proved. Thus, under the provisions of the federal statute requiring full faith and credit to be given to judicial proceedings in the courts of other states, and providing the means of authenticating court records, it was held in Pennsylvania that, in order to carry these provisions into effect, the courts of that state would take notice of the local laws of the state from which the record in question was certified.[1] So, where a judgment of a foreign court was offered in evidence in Wisconsin, judicial notice was taken of the law of the state where it was rendered, by which circuit courts were made courts of general jurisdiction, this being essential to the validity of the authentication of such judgment.[2] So also has judicial notice been taken of the constitution of a sister state,[3] particularly where the purpose of such recognition was to show that the record was authenticated by the proper clerk, and that it was the judgment of a court of record.[4] And state courts have also taken notice of the laws of other states, where the validity of acts done under such laws was recognized.[5] So the courts of Kentucky have taken judicial notice of the laws of Virginia, which were common to the two states prior to their separation.[6] So also do the

[1] State of Ohio *v.* Hinchman, 27 Pa. St., 479.
[2] Jarvis *v.* Robinson, 21 Wis., 523.
[3] Butcher *v.* Brownsville, 2 Kan., 70.
[4] Morse *v.* Hewett, 28 Mich., 481; Dodge *v.* Coffin, 15 Kan., 277.
[5] Carpenter *v.* Dexter, 8 Wall., 513.
[6] Delano *v.* Jopling, 1 Litt., 117.

states of Missouri[1] and California[2] take judicial notice of the laws governing their respective territories prior to their acquisition by the United States; but these can hardly be regarded as exceptions to the rule, as it amounts to nothing more than judicial recognition of the prior laws of the land.[3] The Indiana courts, for similar reasons that govern the courts of Kentucky, take notice of a Virginia statute reserving certain rights to legislate in respect to a portion of the territory known as the "Illinois grant," released to the general government.[4] Following the same principle, the courts of Tennessee have taken judicial notice of certain North Carolina statutes.[5] When the existence of a foreign statute has been once judicially acknowledged, the same court will presume its continuance in force as proven, until its repeal or amendment has been established by competent evidence.[6]

§ 1406. Public Treaties.— Closely allied to public statutes, as being entitled to judicial recognition without pleading or proof, are the treaties entered into by the general government with foreign states or the Indian tribes. Being the public acts of that branch of the government clothed by the federal constitution with plenary powers in the premises, they become a part of the law of the land, to the same extent as though they were the results of national legislation. Hence such treaties will be judicially noticed by both national and state courts.[7] The obligations assumed by the United States rest alike upon the United States and each member of the Union. All are represented by the

[1] Chouteau *v.* Pierre, 9 Mo., 3; Anderson *v.* Biddle, 9 Mo., 580.

[2] Payne *v.* Treadwell, 16 Cal., 220.

[3] See United States *v.* Turner, 11 How., 663.

[4] Henthorn *v.* Doe, 1 Blackf., 157.

[5] Richards *v.* Hicks, 1 Overton, 207. See, also, Middlebury College *v.* Cheney, 1 Vt., 348; Herschfeld *v.* Dexel, 12 Ga., 582.

[6] Graham *v.* Williams, 21 La. An., 594.

[7] Montgomery *v.* Deeley, 3 Wis., 709; La Croix *v.* Sarrazin, 15 Fed. Rep., 489.

treaty-making power, and the courts belong to a branch of the same general government, and are authorized by the same fundamental law, as agencies for carrying out a common purpose. And this recognition must embrace the date of the consummation of such treaties, as well as the particular rights secured or the duties imposed upon either party.[1]

§ 1407. Public Institutions.— Institutions of a public character have in some instances a double claim upon the courts for judicial recognition. They are so recognized because they are established by law; as court-houses, asylums, public prisons, legally authorized banks of issue, and the like.[2] They may also challenge notice on account of their publicity, and well known situation and character. The English courts take judicial notice of the universities of Oxford and Cambridge, and also that they were established for the advancement of religion and learning.[3] Similar institutions in this country might also be taken notice of judicially, as belonging to the history of the country or for the reason that their existence is notorious.

§ 1408. Local Customs, and Special and Private Statutes.— Customs are only judicially noticed when so general in their character as to be universally known. Purely local customs, even those prevalent among the Indian tribes, have been ignored, when it was sought to bring them to the attention of the courts, otherwise than by pleading and evidence.[4] The rules of a board of brokers, not amounting to a general usage of trade,[5] and the laws and customs of a church organization, have been excluded from judicial notice as not possessing sufficient general interest or notoriety to be entitled to recognition by the courts, although they might be quite generally known in the locality.[6] There

[1] Carson *v.* Smith, 5 Minn., 78; Dale *v.* Wilson, 16 Minn., 525.

[2] Shaw *v.* The State, 3 Sneed, 86.

[3] Oxford Rate, 8 El. & Bl., 184.

[4] Turner *v.* Fish, 28 Miss., 306; Dutch, etc., Co. *v.* Mooney, 12 Cal., 534; Sullivan *v.* Hense, 2 Colo., 424.

[5] Goldsmith *v.* Sawyer, 46 Cal., 209.

[6] Sarahass *v.* Armstrong, 16 Kan., 192; Youngs *v.* Ransom, 31 Barb., 49.

are, however, many facts to be noticed hereafter as historical, geographical, etc., of which courts have taken notice, upon grounds less satisfactory than would justify a similar recognition of some local customs. Courts will not, in general, take notice of private acts of the legislature.[1] They will not, on demurrer, look beyond the record to ascertain the provisions of such an act when referred to only by its date and title.[2] An act of assembly authorizing a certain railroad company to guarantee the bonds of any incorporated company, individual or firm engaged in manufacturing, in any county through which the company's road should pass, was held to be a private act, of which the court would not take judicial notice.[3] Legislative enactments establishing corporations will only be judicially noticed when declared to be public acts; and this declaration will be in the act itself.[4] When not so designated they are generally regarded as private or special acts, from the nature of the subject of legislation, and the private interests thereby promoted; and when so classified will not be taken judicial notice of even by the courts of the state by whose legislature they were enacted.[5]

§ **1409. Municipal Ordinances.**— The same is true of the ordinances of municipal corporations, when their provisions are at issue in courts of superior jurisdiction.[6] But in

[1] Workingmen's Bank *v.* Converse, 33 La. An., 963.

[2] Broad Street Hotel Co. *v.* Weaver, 57 Ala., 26. But see Halbert *v.* Skyles, 1 A. K. Marsh., 368; Collier *v.* Baptist, etc., Society, 8 B. Monr., 68; Legrand *v.* Hampden Sidney College, 5 Munf., 324. The manner of pleading private statutes is regulated by statute.

[3] Timlow *v.* Philadelphia, etc., R. Co., 99 Pa. St., 284.

[4] Butler *v.* Robinson, 75 Mo., 192. But the expiration of a bank charter has been judicially noticed. Terry *v.* Merchants', etc., Bank, 66 Ga., 177.

[5] Allegheny *v.* Nelson, 25 Pa. St., 332; Drake *v.* Flewellen, 33 Ala., 106; Winnipiseogee Lake Co. *v.* Young, 40 N. H., 420; Atchison, etc., R. Co., *v.* Blackshire, 10 Kan., 477; Danville, etc., Co. *v.* The State, 16 Ind., 456; Hailes *v.* State, 9 Tex. App., 170.

[6] Mooney *v.* Kennett, 19 Mo., 551; Garvin *v.* Wells, 8 Iowa, 286; Luckin *v.* The Commonwealth, 4 Bush, 440; Horace *v.* Chicago, etc., R.

trials before the mayor or other judicial officer of a city, notice may, and probably should, be taken of the ordinances of the municipality.[1] And where a prosecution for the violation of such ordinances was appealed from the police judge of a city to the district court, it was held that even the latter court might, for the purposes of that action, take judicial notice of the incorporation of such city and its ordinances.[2] The enactments of boards of county commissioners fall within this rule. Hence where the boundaries of a township were established by the authority of such a board;[3] or public ferries were by them authorized in the exercise of a power with which they were clothed by statute;[4] or where, pursuant to the general law, they newly divided certain counties and erected new ones,[5] such acts could only appear by pleading and proof, though the law of the state under which they acted was a public statute, and as such entitled to judicial notice. In one or two of the states, however, the rule seems to be, that while the courts will not take notice of private acts, they are not required to be pleaded.[6]

§ **1410. Geographical Facts.**— There are certain geographical facts of which courts will take judicial notice, for the reason that they are universally recognized, or are within the territorial jurisdiction of the court. Thus, in Indiana, the position of the falls of the Ohio river have been so noticed, in connection with the fact that pilots for

Co., 38 Wis., 463; New Orleans *v.* Labott, 33 La. An., 107; Chicago, etc., R. Co. *v.* Klauber, 9 Ill. App., 613; People *v.* Buchanan, 1 Idaho (N. S.), 681.

[1] Laporte City *v.* Goodfellow, 47 Iowa, 572; State *v.* Leiber, 11 Iowa, 407.

[2] Solomon *v.* Hughes, 24 Kan., 211.

[3] Bragg *v.* Rush County, 34 Ind., 406; Indianapolis, etc., R. Co. *v.* Caldwell, 9 Ind., 397.

[4] State *v.* Wise, 7 Ind., 645.

[5] Buckinghouse *v.* Gregg, 19 Ind., 401.

[6] Bliss on Code Pl., § 183, n. 2, citing Legrand *v.* Hampden Sidney College, 5 Munf. (Va.), 324; Collier *v.* Baptist, etc., Soc'y, 8 B. Mon., 68; Halbert *v.* Skyles, 1 A. K. Marsh., 368.

no other falls were appointed in that state;[1] also the division of land into sections, and the direction from one quarter-post to another.[2] So the boundary lines of counties have been noticed, as well to determine what towns were included as to ascertain their area.[3] But in respect to the location of towns, and the boundaries of counties, the rule is by no means uniform. Thus, though it is decided in Texas that the court would take judicial notice that Galveston was within a county of the same name;[4] that a certain town was within a certain county, where the fact was recognized by a public statute;[5] and that a town is situated in a county of which it is the seat of government;[6] the courts of the same state will not take notice of the situation of all named localities within particular counties.[7] Nor will the location of towns, within the boundaries of a particular county, be judicially noticed in every instance by the courts of Georgia.[8] Public policy requires that the courts should recognize the fact that certain lands are within the Indian reservation.[9] So, in Alabama, the court took notice that certain real estate embraced in the district of lands for sale at Cahawba, was in that state;[10] and that Mobile belonged to a certain chancery district.[11] The United States supreme court will take judicial notice that by law the country is divided into collection districts for revenue purposes, and that such dis-

[1] Cash *v.* Auditor, 7 Ind., 227.

[2] Mossman *v.* Forrest, 27 Ind., 233.

[3] Ham *v.* Ham, 39 Me., 363; The State *v.* Jackson, 39 Me., 291; Board of Com'rs, etc., *v.* Spitler, 13 Ind., 235; Indianapolis, etc., R. Co. *v.* Moore, 16 Ind., 43; Solyer *v.* Romanet, 52 Tex., 562; Hoffman *v.* State, 12 Tex. App., 406; State *v.* Reader, 60 Iowa, 527; Indianapolis, etc., R. Co. *v.* Stephens, 28 Ind., 429.

[4] Solyer *v.* Romanet, 52 Tex., 562.

[5] Hoffman *v.* State, 12 Tex. App., 406.

[6] Carson *v.* Dalton, 59 Tex., 500.

[7] Boston *v.* State, 5 Tex. App., 383.

[8] Clayton *v.* May, 67 Ga., 769.

[9] French *v.* Lancaster, 2 Dak., 346.

[10] King *v.* Kent, 29 Ala., 542.

[11] Alabama Gold Life Ins. Co. *v.* Cobb, 57 Ala., 547.

tricts have defined geographical boundaries.[1] Such prominent features of the geography of the country as the situation of large cities, the great lakes, mountains, rivers and the boundaries of states are matters that claim the attention of courts; but it was necessary at one time for a court of last resort to decide the mooted question, whether the courts of Missouri should take judicial notice of the fact that that state was east of the Rocky Mountains.[2] The following facts have been judicially noticed, on account of their geographical prominence: The distance between well known points by the usual routes of travel,[3] and in one case the ordinary speed of railroad trains between such points;[4] that a portion of a public road between two points lay within a certain county;[5] the relative situations of a city and a river;[6] the fact that a particular river did not lie, throughout its entire length, in one state;[7] the navigability of large streams;[8] and in the admiralty courts, judicial notice was not only taken of the situation of a foreign town, with reference to a certain river, but it was also noticed that a bar formed in the mouth of the river, over which vessels of a certain draught could not pass.[9] There are certain other geographical features that are not noticed by all the courts, for the reason

[1] United States *v.* Jackson, 104 U. S., 41.

[2] Price *v.* Page, 24 Mo., 65.

[3] Pearce *v.* Longfit, 101 Pa. St., 507; 47 Am. Rep., 737; Rice *v.* Montgomery, 4 Biss., 75; Fabyan *v.* Russell, 38 N. H., 84.

[4] Pearce *v.* Longfit, 101 Pa. St., 507.

[5] Indianapolis, etc., R. Co. *v.* Case, 15 Ind., 2; Indianapolis, etc., R. Co. *v.* Paramore, 12 Ind., 406.

[6] City Council, etc., *v.* Montgomery, etc., Co., 31 Ala., 76; Winnipiseogee Lake Co. *v.* Young, 40 N. H., 420.

[7] Cummings *v.* Stone, 13 Mich., 70.

[8] Wood *v.* Fowler, 26 Kan., 682; 40 Am. Rep., 330; Neardhouser *v.* State, 28 Ind., 257.

[9] The Peterhoff, Blatch. Prize Cas., 463. At one time the Texas courts refused to take judicial notice of the fact that the cities of New York and New Orleans were not in the state of Texas. Whitlock *v.* Castro, 22 Tex., 108; Russell *v.* Martin, 15 Tex., 238.

that they are only notorious within very narrow limits. To claim undisputed attention of the courts, geographical facts should be historical and traditional within the district where brought in question, or of such prominence as to raise the presumption that they are generally known. Hence the capacity for navigation of "Five-Mile Run," in Cattaraugus county, New York, was held to be a fact of which the court would not take judicial notice.[1] So the court refused to take notice of the distance between the seat of government and a particular mining location;[2] and of the locality of the office of a particular justice of the peace, and that a particular number on a certain street was in a given ward or district of a city.[3] In this connection, the case of People *v.* Callahan[4] is illustrative of the result of asking too much of the court in the way of judicial notice of local geographical facts. The court very properly refused to take notice of the locality of the streets and avenues, and their termini, and the houses situated thereon. For like sufficient and obvious reasons, the courts of Illinois would not take notice of the intersection of a street with a certain railroad track.[5] Nevertheless, such matters as these may be brought to the attention of the court in such a manner as to bring them within the classification of geographical facts to be judicially noticed. Thus where certain streets of the city of San Francisco were designated on the official map of the city, it was held that the court was not only bound to take judicial notice of such streets, where marked on a diagram filed in the case, but also of the relations of such streets with each other and the directions in which they run.[6] The rule in England as to geographical facts of which the courts take judicial notice is much the same as in this country; a distinction

[1] Buffalo Pipe Line Co. *v.* New York, etc., R. Co., 10 Abb. N. C., 107.
[2] Russell *v.* Hoyt, 4 Mont., 412.
[3] Allen *v.* Scharringhausen, 8 Mo. App., 229.
[4] 60 How. Pr., 372; 23 Hun, 581.
[5] Pennsylvania Co. *v.* Frana, 13 Ill. App., 91.
[6] Brady *v.* Page, 59 Cal., 52.

which would probably obtain here is there made between courts, as to the relation of their jurisdiction to the geographical features in question. The courts generally are required to notice such facts as that the colony of Victoria is abroad, or beyond seas;[1] and that a place lies east or west of Greenwich.[2] So where an act gave jurisdiction to justices of a county, and an order was made under it by the justices, who described themselves as justices "in and for the said city," it was held that the court would take notice that the city was also the county.[3] Upon the other hand, the courts refused to notice that a particular street was not in a certain county, although the fact was quite generally known in the community,[4] and also whether particular places were within certain counties.[5] Nevertheless it was held that the courts of quarter sessions should take judicial notice of the petty sessional divisions in their counties.[6]

§ **1411. Historical Facts, Incorporation of Towns, etc.**—In a preceding section we have called attention to the unwillingness of the courts to take judicial notice of private or local statutes, and the exceptions to the general doctrine.[7] We have seen that except where a statute is declared by the legislature to be public, and it refers to private or local interests, such as acts of incorporation and the like, the courts will require them to be established by pleading and proof, or at least by proof, where they are not required to be pleaded. Nevertheless there are certain legislative acts of a private, special or local character, of which the courts seem inclined to take judicial notice in an indirect manner, on account of the historical prominence of the facts in which they result, even where they are not

[1] Cooke *v.* Wilson, 2 Jur., N. S., 1094; 1 C. B., N. S., 153.
[2] Curtis *v.* March, 4 Jur., N. S., 1112.
[3] Reg. *v.* St. Maurice, 16 Q. B., 908.
[4] Humphreys *v.* Budd, 5 Jur., 630.
[5] Brune *v.* Thompson, 2 Q. B., 789; 2 G. & D., 110.
[6] Reg. *v.* Whittles, 13 Q. B., 248.
[7] *Supra*, § 1408.

declared to be public acts. Thus, where it appeared in the record of a case that a certain town had assumed to act as an incorporated village, and an offense was charged as having been committed within its corporate limits, the court took notice of its incorporation.[1] So in Virginia it is held that in an action against a railroad company by name, the court would so far take notice of the fact that defendant was a corporation that the allegation need not be made in the pleadings, nor proof offered in support thereof, unless its incorporation were denied under oath.[2] But elsewhere it is decided that the courts would not take notice of the fact that the inhabitants of a particular town or district had availed themselves of the provisions of a general law, to become incorporated.[3] There are prominent historical facts, however, which are more uniformly and consistently noticed by the courts. For example, the actual destruction of the institution of slavery, as a result of the late civil war, prior to the adoption of the constitutional amendment by which it was abolished, or any legislation to that end, was recognized as a fact of history.[4] The existence of this war, together with most of the prominent events that marked its origin and progress from 1861 to 1865, have been judicially noticed.[5] Thus the actual termination of armed resistance to the general government, though not marked by anything corresponding to a treaty of peace, has been so noticed, and that hostilities ceased prior to the 1st day of June, 1865, so that the regular transmission of mails between points within the section theretofore known as hostile to the general government, was resumed prior to the 18th day of December of that year.[6] So, as an incident of the war, judicial notice was taken that "dollars" of Confederate

[1] Doyle *v.* Bradford, 90 Ill., 416.

[2] Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt., 602.

[3] Hopkins *v.* Kansas City, etc., R. Co., 79 Mo., 98; Temple *v.* State, 15 Tex. App., 304; 49 Am. Rep., 200.

[4] Ferdinand *v.* The State, 39 Ala., 706.

[5] Cuyler *v.* Ferrill, 1 Abb. (U. S.), 169.

[6] Turner's Adm'r *v.* Patton, 49 Ala., 406.

money were of different value from money of the same denomination recognized by the United States;[1] and in Georgia, "Sherman's march to the sea," and the date when it occurred, were judicially noticed.[2] The farthest advance made by any court, towards usurpation of the province of both the lawyer and the jury, in order to arrive at conclusions without judicial inquiry, was where the supreme court of Alabama took notice of the fact that in the years immediately following the war, the people of that state were suffering from great pecuniary embarrassment and insolvency, and that, in consequence, it may have been extremely difficult for a guardian to discharge his duty to his wards.[3] This case is confronted by another from a neighboring state, where a more notorious fact of history, belonging to the same series of events, was ignored. This was the firing upon Fort Sumter, in 1861.[4] So in Tennessee the relative positions of the two armies was not judicially noticed in one case.[5] The court of claims took judicial notice of Fremont's public career in California, as a matter embraced in the history of the country.[6] So the supreme court of Indiana will notice all facts of general importance connected with the history of that state, and of its topography and condition.[7] So, also, will the Illinois courts recognize the population of a county, according to the census, for the purpose of classifying it under the constitutional provision regulating the fees of clerks of circuit courts.[8] The separation of a church into two branches, one "north" and one "south," has been regarded of sufficient historical importance to entitle it to judicial notice.[9] So,

[1] Keppel's Adm'rs *v.* Petersburg R. Co., Chase's Dec., 167.
[2] Williams *v.* State, 67 Ga., 260.
[3] Ashley's Adm'x *v.* Martin, 50 Ala., 537.
[4] Bishop *v.* Jones, 28 Tex., 294.
[5] Kelley *v.* Storey, 6 Heisk., 202.
[6] De Celis *v.* United States, 13 Ct. of Cl., 117.
[7] Williams *v.* State, 64 Ind., 553.
[8] Worcester Bank *v.* Cheney, 94 Ill., 430.
[9] Humphrey *v.* Burnside, 4 Bush, 215.

the political and social condition of a state,[1] though it can only be in respect to very striking and well-known features of such condition, as in the case last cited, that the principal industry of the state was mining, and that large portions of the land were mineral in character and belonged to the government of the United States.[2] It was also judicially noticed as a historical fact that in times past the court was held in a certain place, and the times when it was so held.[3] It has been laid down that the facts of history of which judicial notice will be taken on appeal are only such as are of general notoriety, and of interest to the people of the entire state.[4] It seems consistent with this rule of confining attention to matters of interest to the state, that in Texas, where the common law was not adopted, the court refused to take judicial notice of its adoption in other states.[5] Such matters as the division of the state into judicial and congressional districts;[6] into counties, etc.,[7] and the counties into townships or other subordinate political divisions,[8] will be judicially noticed as part of the public legislation of the state, or they may be so noticed as geographical or historical facts. The courts of Indiana are bound to take notice, as part of its history, as well as the result of its laws, that during and since the civil war, the adjutant-general has made records of the muster rolls of the regiments furnished the United States.[9]

[1] Lewis *v.* Harris, 31 Ala., 689; Irwin *v.* Phillips, 5 Cal., 140.

[2] Irwin *v.* Phillips, 5 Cal., 140.

[3] Ross *v.* Austill, 2 Cal., 183.

[4] McKinnon *v.* Bliss, 21 N. Y., 206.

[5] Bradshaw *v.* Mayfield, 18 Tex., 21.

[6] United States *v.* Johnson, 2 Sawyer, 482; The People *v.* Robinson, 17 Cal., 363.

[7] Buckinghouse *v.* Gregg, 19 Ind., 401; La Grange *v.* Chapman, 11 Mich., 499; Martin *v.* Martin, 51 Me., 366; Woodward *v.* Chicago, etc., R. Co., 21 Wis., 309; Hinckley *v.* Beckwith, 23 Wis., 328; Cook *v.* Tallman, 40 Iowa, 133.

[8] State *v.* Powers, 25 Conn., 48; Kidder *v.* Blaisdell, 45 Me., 461; Wright *v.* Dunham, 13 Mich., 414; Treasurer *v.* Bishop, 39 Vt., 353.

[9] Monroe County Com'rs *v.* May, 67 Ind., 562.

§ 1412. **Election and Appointment of Officers.**— When it is laid down as a general principle that courts will take judicial notice of the officers chosen at a general election, it is not to be understood, where the election of a particular contestant is the matter at issue, that the court will take judicial notice of the ultimate fact, and thus end the controversy. In taking notice of the law authorizing the election, there is no admixture of fact to distinguish this from other public statutes. But it is the action taken under the statute that the court recognizes when it takes notice of the holding of the election, the officers chosen, and their terms of office.[1] Hence the court is supposed to know who is the chief executive of the state or nation, also who fill the other offices, the incumbents of which were required to be chosen at a general election, by reason of the judicial notice taken of the result of the election and the duration of the official terms.[2] Judicial notice will also be taken of the appointment of officers,[3] when that is the mode of selection provided by law. But courts will not take notice of the official character of any person claiming to act in that capacity, unless the office be one of those mentioned in the statute or authorized by law.[4] It is held that the appellate court will take notice of who are the judges of subordinate courts within the same jurisdiction.[5] So that the trustee of the civil township is also trustee of the school township.[6] It

[1] State *v.* Merrick, 15 Iowa, 123; Ellis *v.* Reddin, 12 Kan., 306; Davis *v.* Best, 2 Iowa, 96; Ragland *v.* Wynn, 37 Ala., 32; Alexander *v.* Burnham, 18 Wis., 199; Himmelman *v.* Hoadley, 44 Cal., 213.

[2] Wells *v.* Jackson, etc., Co., 47 N. H., 285; Dewes *v.* Colorado Co., 32 Tex., 570; Hizer *v.* The State, 12 Ind., 330; Ingraham *v.* The State, 27 Ala., 17; Ragland *v.* Wynn, 37 Ala., 32; Fancher *v.* De Montegre, 1 Head, 40; Fox *v.* Commonwealth, 81 Pa. St., 511.

[3] Burnett *v.* Henderson, 28 Tex., 588; People *v.* Lyman, 2 Utah, 30.

[4] Alford *v.* State, 8 Tex. App., 545.

[5] Kilpatrick *v.* The Commonwealth, 31 Pa. St., 198; *Ex parte* Peterson, 33 Ala., 74; Graham *v.* Anderson, 42 Ill., 514. But see Russell *v.* Sargent, 7 Ill. App., 98.

[6] Inglis *v.* State, 61 Ind., 212.

may fairly be doubted whether the local courts of one portion of the state would be required to take notice of all the subordinate officers chosen at a general election in other portions of the state, without resorting to some means of ascertaining the very truth of the fact, even where the principle of judicial notice went so far as to dispense with averment in the pleadings and proof by the ordinary methods. It could hardly be supposed that the presiding judge or justice would, as a matter of fact, be acquainted with the persons of each officer so chosen throughout the state. But circuit courts take notice of the officers of the county where the court is in session.[1] This is particularly true of officers of the court, as sheriff and clerk.[2] So the state courts are bound to know the officers of federal courts within the state,[3] and have even recognized mustering officers, who were known to the whole community as in the employ of the general government.[4] But the courts will not, in general, recognize mere deputies nor their official acts, except where they are done in the name of the chief officer.[5] It is not always the general election and its result which requires the court to notice the officer. Notice has been taken of officers regardless of the manner in which they were selected, and even where they came in by succession on the death or removal of a predecessor.[6] When it is remembered that judicial notice is not taken of the election for the purpose of settling disputes as to who received the majority of votes cast, it will be apparent that it is of officers *de facto*, of which the courts take notice, regardless of whether they are officers *de jure* or not.[7] Indeed, so indifferent are the courts to the results of elections, as such, that

[1] Dyer *v.* Flint, 21 Ill., 80.

[2] Thompson *v.* Haskell, 21 Ill., 215; Bishop *v.* The State, 30 Ala., 34.

[3] Buford *v.* Hickman, 1 Hempst., 232.

[4] Chapman Township *v.* Herrold, 58 Pa. St., 106.

[5] Joyce *v.* Joyce, 5 Cal., 449; Ward *v.* Henry, 19 Wis., 76.

[6] Lindsey *v.* Attorney-General, 33 Miss., 508.

[7] The State *v.* Williams, 5 Wis., 308; Clark *v.* Commonwealth, 29 Pa. St., 129.

they have refused to take notice of such results when the object was to take the sense of the community upon what are known as "local option laws." They were not recognized either as laws or the results of general elections.[1] But the reason for ignoring such elections as these or their results, when provided for by a general statute, is not very clear.

§ 1413. Official Signatures and Seals.—Not only will courts take judicial notice of the officers of the county within which they are regularly held, but for many purposes they will take notice of their official signatures.[2] Thus, the court will recognize, without allegation or proof, the signature of a clerk of a court of record to a transcript;[3] the official signature of the register or recorder of deeds,[4] the collector of levee taxes,[5] and the signatures of attorneys of the court.[6] The signatures of state officers are judicially noticed, and in one instance, at least, that of the deputy auditor-general.[7] The seal and signature to a patent to public lands of the United States will be judicially noticed by all courts, both state and federal, without being pleaded or supported by evidence of their genuineness.[8] But the doctrine that courts will take notice of the signatures of officers, even of the county, is subject to certain qualifications. Thus, they will uniformly take notice of the signatures of clerks of courts, when such signatures are

[1] Johnson *v.* Common Council, 16 Ind., 56.

[2] Wetherbee *v.* Dunn, 32 Cal., 106; Alderson *v.* Bell, 9 Cal., 315; Jones *v.* Galis' Curax'r, 4 Mart., 635; Wood *v.* Fitz, 10 Mart. (O. S.), 196; Follain *v.* Lefevre, 3 Rob. (La.), 13; Despau *v.* Swindler, 3 Mart., N. S., 705. [But courts will not take notice of the signatures of parties to actions. Litchfield *v.* Burwell, 5 How. Pr., 346; Alderson *v.* Bell, 9 Cal., 315.]

[3] State *v.* Postlewait, 14 Iowa, 446; State *v.* Shilling, 14 Iowa, 455.

[4] Scott *v.* Jackson, 12 La. An., 640.

[5] Templeton *v.* Morgan, 16 La. An., 438.

[6] Masterson *v.* Le Claire, 4 Minn., 163; Symmes *v.* Major, 21 Ind., 443.

[7] People *v.* Johr, 22 Mich., 461.

[8] Yount *v.* Howell, 14 Cal., 465; Patterson *v.* Winn, 5 Wheat., 232.

affixed to copies of the proceedings of the court,[1] while it has been doubted whether the signature of the same officer, though affixed in the line of his duty, to a county bond, would be so recognized.[2] Nevertheless, the signature of a county officer to a tax deed was judicially noticed in California.[3] So, notwithstanding the notice taken by the courts of the signatures of attorneys, it is only when they are used in connection with their professional duties as officers of the court.[4] The signature of a notary public is also noticed by the courts of Illinois, when he is authorized to certify to an oath without a seal.[5] It goes without saying that a court will be presumed to know the signature of its own clerk.[6] Official seals are more extensively noticed in this manner than the mere signatures. Thus the national seals of countries recognized by the United States are entitled to judicial recognition.[7] So the seal of a notary public is entitled to notice when used to attest acts done under the *lex mercatoria*, but not otherwise, except as provided by statute.[8]

§ 1414. Terms of Court and Judicial Proceedings.— Appellate courts take judicial notice of subordinate courts within the same territorial jurisdiction and of their terms, and the extent of their jurisdiction as prescribed by law.[9] This, it will be noticed, amounts to little else than taking judicial notice of public laws; but when notice is taken of the signatures of judges or justices of subordinate courts,

[1] Major *v.* The State, 2 Sneed (Tenn.), 11.

[2] Judge Bliss in 2 Cent. L. J., 447.

[3] Wetherbee *v.* Dunn, 32 Cal., 106.

[4] Masterson *v.* Le Claire, 4 Minn., 163.

[5] Dyer *v.* Flint, 21 Ill., 80.

[6] Buell *v.* State, 72 Ind., 523.

[7] The Estrella, 4 Wheat., 298; United States *v.* Palmer, 3 Wheat., 610.

[8] Bliss on Code Pleading, § 197; Pierce *v.* Indseth, 106 U. S., 546.

[9] Tucker *v.* The State, 11 Md., 322: Graham *v.* Anderson, 42 Ill., 514; Pugh *v.* The State, 2 Head, 227; Morgan *v.* The State, 12 Ind., 448; McGinnis *v.* The State, 24 Ind., 500; Davidson *v.* Petticolas, 34 Tex., 27; Rodgers *v.* The State, 50 Ala., 102; Meshke *v.* Van Doren, 16 Wis., 319; Lewis *v.* Wintrode, 76 Ind., 13.

they are so recognized as matters of notoriety.[1] The extent to which one court will take notice of the rules of another is a little uncertain.[2] It is probable that a trial court will be required to take notice of the rules of the appellate tribunal; but the converse of this proposition is not generally true. The rules of the trial court are not noticed by the appellate courts either as public law or matters of general notoriety.[3] In one case, however, where law and equity were administered in separate tribunals, it was held that all courts within the jurisdiction should take judicial notice of the rules of the court of chancery.[4] Nevertheless, courts are not required to take judicial notice of the rules or proceedings of other courts of similar or inferior jurisdiction.[5] Nor is a state court required to take notice that proceedings in bankruptcy have been instituted by or against parties to a suit pending therein.[6] But it is otherwise of the rules, judgments and proceedings of the court, where they are relied on as matters entitled to judicial notice. Thus the court would notice its own judgment in a suit which was virtually a portion of the same record,[7] and the existence before a judge of a court, of a prosecution for crime, against one called as a juror in his court.[8] This rule, however, is subject to certain modifications. Thus, a circuit court sitting in one county refused to take notice of a *nolle prosequi* entered in another county of the same circuit, and its refusal was approved by the supreme court of the state.[9] The mere fact that the knowledge of what has transpired in the

[1] *Supra*, § 1413.

[2] See and compare Contee *v.* Pratt, 9 Md., 73; Cherry *v.* Baker, 17 Md., 75; Scott *v.* Scott, 17 Md., 78.

[3] Cherry *v.* Baker, 17 Md., 75; Cutler *v.* Caruthers, 48 Cal., 178; O'Conner *v.* Koch, 56 Mo., 259.

[4] Contee *v.* Pratt, 9 Md., 73.

[5] Vassault *v.* Seitz, 31 Cal., 225.

[6] Esterbrook Steel Pen, etc., Co. *v.* Ahern, 3 N. J. Eq., 341.

[7] Farrar *v.* Bates, 55 Tex., 193.

[8] State *v.* Jackson, 35 La. An., 769.

[9] State *v.* Edwards, 19 Mo., 674.

course of a trial is present with the judge, when asked to notice it, is not sufficient to bring it within the class of facts that do not require pleading or proof.[1] Where, in an action on a recognizance for review, it appeared that the reviewer had obtained judgment for damages and costs, the court refused to take judicial notice that costs had accrued subsequent to the judgment.[2] So have the courts refused to take notice of their own proceedings of record in another trial,[3] or that there was any connection between the case at bar and one previously tried in the same court.[4] And where an affidavit which had been used in a former case in the same court was offered and admitted, the court refused to take notice of the facts of its former use.[5] So, although the judges of a subordinate court and its attorneys are known to the appellate court, the latter would not take judicial notice that the judge of one of the subordinate courts, and one of its own attorneys, was identically the same person.[6] Judicial notice will be taken of the superior courts of other states of the Union and also of the United States, and in New York of the courts of the Dominion of Canada.[7] So foreign courts of admiralty and their seals will be judicially noticed in this country;[8] but beyond this, their existence must be pleaded and proved as any other foreign law.[9]

§ 1415. The General Course of Nature.— Courts are presumed to know the general course of nature, and take judicial notice of natural phenomena which belong to the class that is uniform and of general notoriety. That the day

[1] Wheeler *v.* Webster, 1 E. D. Smith, 1.

[2] Brown *v.* Clark, 28 Vt., 690.

[3] People *v.* De La Guerra, 24 Cal., 73; Lake Merced Water Co. *v.* Cowles, 31 Cal., 215.

[4] Banks *v.* Burnam, 61 Mo., 76.

[5] Baker *v.* Mygatt, 14 Iowa, 131.

[6] Ellsworth *v.* Moore, 5 Iowa, 286.

[7] Lazier *v.* Westcott, 26 N. Y., 146.

[8] 1 Stark. on Ev. (8th Am. ed.), 418, 419.

[9] Yrisarri *v.* Clement, 3 Bing., 438.

follows the night in consequence of the diurnal rotation of the earth; the recurrence of seasons in their order; the ordinary computation of time, and the like;[1] and consequently they will notice the coincidence of a certain day of the month with a particular day of the week.[2] So they will notice in connection with the regular order of the seasons, that for purposes of husbandry the use of a farm is worth much more per acre during the cropping season than for six months, embracing the winter;[3] the hour at which the sun rose on a particular day;[4] that there are no tidal streams in a designated inland county;[5] that there were certain seasons during which particular crops would mature in the state,[6] and also the period of gestation.[7] Where the fact is not only invariable, but universally known, or is ascertainable by common and well recognized authority, as the almanac, it comes properly within the range of judicial cognizance. But courts do not pretend to rely upon their technical knowledge of all natural laws, nor will they always take notice of the existence of such laws in which the belief is quite general, and supported by respectable authority. Thus the court would not take judicial notice that the age of a tree could be determined by counting the concentric rings shown by a section of its trunk.[8]

§ 1416. Scientific and Other Facts of Uniform Occurrence.— To a certain extent the courts will accept, without allegation or proof, facts of which our knowledge is acquired by a study of the natural sciences. Thus, the simple and fundamental rules of mathematics, including the axioms of

[1] Dixon *v.* Niccolls, 39 Ill., 372.

[2] Allman *v.* Owen, 31 Ala., 167; Sprowl *v.* Lawrence, 33 Ala., 674; Rodgers *v.* The State, 50 Ala., 102; Philadelphia, etc., R. Co. *v.* Lehman, 56 Md., 209; McIntosh *v.* Lee, 57 Iowa, 156.

[3] Ross *v.* Boswell, 60 Ind., 235.

[4] People *v.* Chee Kee, 61 Cal., 404.

[5] Walker *v.* Allen, 72 Ala., 456.

[6] Floyd *v.* Ricks, 14 Ark., 286.

[7] King *v.* Luffe, 8 East, 193.

[8] Patterson *v.* McCausland, 3 Bland, 69.

geometry, would be so noticed. That a section of land containing six hundred and forty acres was made up of four quarter-sections, of one hundred and sixty acres each, was not considered too abstruse to be entitled to judicial recognition.[1] The facts to be thus recognized can only be selected upon the principle that the courts accept some of the laws of nature and reject others. There should be universal approval and notoriety. But they must be governed to some extent by the state of knowledge of the fact in the community. Thus, in Indiana, while the courts take judicial notice that whisky is intoxicating,[2] and refuse to recognize the fact that wine is not intoxicating,[3] they nevertheless hold that the court cannot take judicial notice that common brewer's beer is an intoxicating beverage.[4] In Commonwealth *v.* Peckham it is said: "As well might we require proof that *gin* is liquid, as that it was intoxicating."[5] And yet the court would probably not be willing to take judicial notice of the percentage of alcohol in this or any other kind of stimulant. The difference between the liquors above mentioned would generally be regarded as only one of degree. In Wisconsin the intoxicating nature of beer, as well as that it is a malt liquor, seems to be more widely known than in Indiana, and is for that reason judicially noticed.[6] On nearly the same plane of notoriety as the foregoing in reference to liquids, is the fact that coal oil is inflammable, of which the courts of Missouri are authorized to take judicial notice;[7] while in New York they will not take notice that kerosene oil is a refined coal oil, or a refined earth oil;[8] and in Vermont the courts would not recognize, without proof of the fact, the inflammability of gin and turpentine,

[1] Hill *v.* Bacon, 43 Ill., 477.
[2] Harman *v.* The State, 18 Ind., 450.
[3] Jackson *v.* The State, 19 Ind., 313.
[4] Klare *v.* The State, 43 Ind., 483.
[5] 2 Gray, 514.
[6] Briffitt *v.* State, 58 Wis., 39; 46 Am. Rep., 621.
[7] State *v.* Hayes, 78 Mo., 307.
[8] Bennett *v.* North British, etc., Ins. Co., 8 Daly, 471.

for the purpose of avoiding a policy of insurance.[1] While the court will probably take judicial notice of the grammar of the English language, including the ordinary orthography and pronunciation of words, the line should be drawn at proper names, for which there is no fixed rule. In particular will the court refuse to take notice of the orthography of names in the Polish language.[2]

§ 1417. Facts Occurring in the General Course of Human Life — The Arts, etc. — There are other facts, which have been aptly classified as belonging to "the general course of the transactions of human life," and consequently such as ought to be universally known, of which the courts will take judicial notice.[3] The example furnished by the case cited was the general knowledge of the peculiar nature of lotteries. And though this doctrine will not admit of indiscriminate extension and application to all things which may be regarded as common in the community, it is unquestionably proper for the court to dispense with proof of usages and customs of business of such antiquity and general use that all men may be fairly presumed to know them.[4] Thus it was considered that it was sufficiently well known, for this purpose, that the facilities of travel have been greatly increased by steam navigation and by railroads;[5] that at one time gold coin was no longer in general circulation as the money of this country, but had become a commodity of traffic;[6] that business houses furnish each other's clerks with goods, and charge them to each other;[7] that, as a general rule, trains running upon a railroad are run, directed and controlled by the owners of the

[1] Mosley *v.* Vermont, etc., Ins. Co., 55 Vt., 142.

[2] State *v.* Johnson, 26 Minn., 316.

[3] Boullement *v.* The State, 28 Ala., 83.

[4] Munn *v.* Burch, 25 Ill., 35.

[5] Manning *v.* Gasharie, 27 Ind., 399; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App., 374.

[6] United States *v.* American Gold Coin, 1 Woolw., 217.

[7] Cameron *v.* Blackman, 39 Mich., 108.

road,[1] and that a box freight-car standing still at a highway crossing will not frighten horses of ordinary gentleness.[2] In adjusting the rights of parties, courts will take notice of notorious changes in business methods and of new processes of practical utility in facilitating trade.[3] They have no right to assume ignorance of current phrases which everybody else understands.[4] Accordingly the supreme court of Maine recognized the initials "C. O. D.," when affixed to packages sent from seller to buyer by common carriers, as a proper subject for judicial notice; that it meant that delivery is to be made on payment of the purchase price and the carriers' charges.[5] But in Missouri this was regarded as a question of fact for the jury, and hence requiring proof.[6] It is also held that the courts will take notice of the term "gift enterprise."[7] Upon grounds of general notoriety, the courts have noticed the fact that the society of Free Masons is a purely charitable or eleemosynary organization,[8] and that "adm." was intended as an abbreviation of "administrator."[9] So courts of admiralty have taken judicial notice of the course of trade between the West Indies and certain ports of the southern states of the Union then under blockade;[10] and in one instance went the length of taking cognizance of the fact that a firm in Nassau had been actively and extensively engaged in violating the blockade.[11] Judicial knowledge seems to have been extended in

[1] South, etc., R. Co. *v.* Pilgreen, 62 Ala., 305; Evansville, etc., R. Co. *v.* Smith, 65 Ind., 92.

[2] Gilbert *v.* Flint, etc., R'y Co., 51 Mich., 488; 47 Am. Rep., 592.

[3] Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 5 Mo. App., 374.

[4] Bailey *v.* Kalamazoo, etc., Co., 40 Mich., 251.

[5] State *v.* Intoxicating Liquors, 73 Me., 278.

[6] McNichol *v.* Pacific Ex. Co., 12 Mo. App., 401.

[7] Lohman *v.* State, 81 Ind., 15.

[8] Burdine *v.* Grand Lodge of Alabama, 37 Ala., 478.

[9] Moseley *v.* Mastin, 37 Ala., 216.

[10] The Mersey, Blatch. Prize Cas., 187; The William H. Northrop, id., 235; The Stephen Hart, id., 387; The Peterhoff, id., 463.

[11] The Minna, Blatch. Prize Cas., 333.

one case to the value of ordinary labor,[1] which is probably the uttermost limit to which the doctrine has been carried, and, in view of the numerous notable facts which other courts have refused to notice, appears to be a capricious exercise of discretion. The rules and regulations of the departments of the general government would seem to be peculiarly within the range of judicial cognizance; but where it was attempted to justify the absence of original papers, in order to introduce copies certified by the surveyor-general for California, and also by the secretary of the United States land commissioners, upon the ground that the rules of the department forbade the removal of such originals from the files in the surveyor-general's office, the court laid it down broadly that judicial notice would not be taken of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or the surveyor-general.[2] And yet the rules and regulations of these departments, for many purposes, have the force and effect of positive law; and it would seem that the preservation of papers on file in a public office would be peculiarly within the province of the rule-making power of the departments. The supreme court is not bound to take notice of the recording of an instrument in a particular county merely because the county court is required by law to take notice of it.[3] So the courts have refused, more or less capriciously, to take judicial notice of the depreciation of the currency during the late war;[4] that a bank makes a profit by exchange;[5] of a local custom entitling prior possessors of land to the use of water for mining purposes, etc.;[6] that a bank in a foreign state is

[1] Bell *v.* Burnett, 2 J. J. Marsh., 516.
[2] Hensley *v.* Tarpey, 7 Cal., 288.
[3] Cicero, etc., Co. *v.* Craighead, 28 Ind., 274.
[4] Modawell *v.* Holmes, 40 Ala., 391.
[5] Murray *v.* Barney, 34 Barb., 336.
[6] Lewis *v.* McClure, 8 Oreg., 273.

in an insolvent condition;[1] the value of Canada money;[2] the value of an attorney's services;[3] the private seal of the governor of a province;[4] who were meant by "black republicans;"[5] the age of a person arraigned for crime;[6] that a railroad corporation had a seal other than a scrawl which appeared to be used for that purpose;[7] and the meaning of a printer's private mark to an advertisement, thus, "Oct. 3, 4t," as indicating the date and term of publication.[8] The arts are also judicially noticed when the matter in question is not too greatly obscured by technicalities. Thus the art of photography, together with the mechanical and chemical processes employed, the scientific principles on which it is based, and its results, are noticed in a general way.[9] The character, construction and use of the ice-cream freezer has also been included in the class of noticeable facts.[10] Upon comparing the rulings of the courts upon this subject, it will be observed that they have been guided by no very exact rule. In the main there is good and sufficient reason for their acceptance or rejection of a fact claimed to be judicially cognizable. But instances will be found where certain facts have been so recognized on account of their notoriety, which, if they were taken as the standard, would carry with them some of the others which are ignored. So, too, are there instances, where others are rejected for reasons that would apply equally well to many which are generally accepted as worthy of judicial notice. This diversity of opinion in particular cases only partially

[1] Market Bank *v.* Pacific Bank, 27 Hun, 465.
[2] Kermott *v.* Ayer, 11 Mich., 181.
[3] Pearson *v.* Darrington, 32 Ala., 227.
[4] Beach *v.* Workman, 20 N. H., 379.
[5] Baltimore *v.* The State, 15 Md., 376.
[6] Stephenson *v.* The State, 28 Ind., 272.
[7] Illinois Cent. R. Co. *v.* Johnson, 40 Ill., 35.
[8] Johnson *v.* Robertson, 31 Md., 476.
[9] Lake *v.* Calhoun County, 52 Ala., 115.
[10] Brown *v.* Piper, 91 U. S., 37.

illustrates the difficulty of expressing the general doctrine in anything like a rule that could be uniformly applied. The knowledge possessed by the presiding judge cannot furnish an invariable guide, either in noticing or refusing to notice a fact. Certainly disputed facts of science should not be judicially taken notice of, however well convinced the judge might be upon the question of their truth.

INDEX.

ABANDONMENT, SECTION
defeats notice by possession 296

ABSENCE OF FUNDS,
held to excuse want of notice of dishonor of commercial paper 1001
held not to excuse want of notice of dishonor of commercial paper 1002–1014

ACCEPTANCE,
of, proposals, notice of 378–385
continuing and limited offers 378
necessity of notice 379
time 380
offer by auctioneer 381
by mail 383
continuing until accepted, or rejected, or withdrawn . . 385
of guaranty, notice of 390–408
See GUARANTY.
of rent by unauthorized person, waiver of notice to quit not presumed from 649
of surrender of possession, waiver of notice to quit . . . 643

ACCEPTOR OF BILL,
notice of dishonor given by 710, 711
bankruptcy of, no excuse for failure to give notice . . . 771

ACCOMMODATION PAPER,
notice of diversion of 94*b*
renewal of by partner, held such prior transaction as to entitle payee to notice of dissolution 511
when drawer of, not entitled to notice of dishonor . . 997, 998
when drawer of, entitled to notice of dishonor . . . 999, 1018

ACCOUNT,
assignment of balance due on, notice required 443
notice should be given of intention to examine 1207

ACCURACY OF DESCRIPTION,
substantial and not technical, required in notice to quit 638, 639
same in notice of motion 1193

ACKNOWLEDGMENT, SECTION
of deeds 112
necessity of 125–140
of service of notice, of taking depositions, effect of . 1251, 1254

ACQUIESCENCE,
of principal after notice, releases agent 669

ACTUAL KNOWLEDGE,
of prior rights, most direct manner of binding purchasers . 65
question of fact for the jury 85, 86, 88, 91
may be imputed to purchaser who avoids knowledge . . 91

ACTUAL NOTICE,
conflict of authority as to what is 1
causes of apparent conflict, definitions of 3
distinction between and knowledge 3, 4
different kinds of 5
express 5–7
direct information 7
different sources of 28, 29
must be more than vague statement 29
implied 8–27
distinction between and express 8
distinction between and constructive 8, 36*a*
will bind purchaser, who has not certain knowledge . 9
from circumstances sufficient to put upon inquiry . 10, 13–25
when purchaser affected by 11
amounts to imputation of knowledge 11, 12
negligence for purchaser not to inquire 17
from secrecy of transaction 26
from voluntary ignorance 11
seeing copy of deed 12
recitals in muniments of title 15–17
possession under claim of title 16
held insufficient 14
knowledge of non-payment of purchase price 19
legal title and equitable interest in different persons . 18
discharge of mortgage by one other than mortgagee . 20
notice of trust affecting property purchased 21
insolvency of vendor, acting as trustee 22
inadequacy of price 23, 24
relationship beween grantor and grantee 25
from information sufficient to put upon inquiry . . . 28, 29
degree of certainty required 30
to agent, is actual notice to principal. 31–33, 673*a*
amounts to more than constructive notice to principal . 33

ACTUAL NOTICE — *Continued.* SECTION
necessary to affect purchasers of negotiable paper . . . 80–94
payment of lost bill stopped by advertisement, insufficient 81
holder of bill fraudulently circulated only affected when grossly negligent 82
negligence and bad faith, questions of fact 83
purchaser protected, rule laid down by Story 84
held same as knowledge, but knowledge a question of fact 85
facts which excite inquiry, held inadmissible in evidence 86
purchaser bound to inquire, when facts excite inquiry . 87
circumstances sufficient to put a prudent man upon inquiry, insufficient 87
bad faith on part of purchaser, inference of fact and not of law . . . . . 88, note 1
stolen securities — avoidance of knowledge 89
inquiry excited by inspection of paper, sufficient . . . 90
general or implied notice held sufficient 91
circumstances must be of suspicious character 92
only purchasers who have paid value protected . . . 93
defects apparent on face of instrument 94
of unregistered instruments,
See UNREGISTERED INSTRUMENTS.
to purchasers, evidenced by possession of property . . 275–277
See POSSESSION.
notice from title papers, equivalent to 308
See TITLE PAPERS.
of assignment of choses in action, inferred from circumstances 438, 439
See ASSIGNMENT.
dissolution of partnership, when new customer entitled to . 522
may be inferred from facts sufficient to put upon inquiry . 507
See DISSOLUTION OF PARTNERSHIP.

ACTUAL POSSESSION,
when requisite to constitute notice of claim of title . . 286, 288

ADDRESS,
of notice of dishonor of commercial paper 767
may be to residence or place of business 890, 891
of written notice to quit, what sufficient 630

ADJOURNMENT,
of judicial sale without new publication 1092
of taking depositions, notice after expiration of hour originally fixed 1256

ADMINISTRATOR,
joint, when cannot waive notice of dishonor 762

ADMISSION, SECTION
when it will amount to waiver of notice 1328, 1400
of drawer or indorser, when will not excuse notice . . 964, 968

ADVERSE POSSESSION,
notice of by occupation of premises . . . . . 280, note

ADVERTISEMENT,
of dissolution of partnership 504–508, 513–519
will only affect customer when seen by him 504
circulation of the paper where customer does business not sufficient to charge him 505
reading papers not conclusive 506
inference drawn from publication of 507
what are prior dealings — who is old customer . . . 508–512
will affect new customer 513
time of publication of 514
publication of in newspaper 515
where should be published 516
selection of medium of publication 517
manner of publication of, open to inquiry 518
English and American doctrine, publication held not absolutely essential 519
of original process 1029–1085
See PROCESS, ORIGINAL.
of judicial sales 1086–1104
See JUDICIAL SALES.
of non-judicial involuntary sales 1105–1121
See NON-JUDICIAL INVOLUNTARY SALES.

AFFIDAVIT,
necessary for publication of notice 1032–1048
See PROCESS, ORIGINAL.
for publication of process, averments in not conclusive . . 1083

AGENCY,
Notice of 651–671, 671*a*
principal's liability when agent exceeds authority . . . 651
secret instruction will not limit general authority . . . 652
limited by written authority 653
by representations of agent, bind principal 654
to affect party dealing with agent, must be prior to transaction 655
principal bound by agent's acts in excess of authority by letter of attorney 656
by contents of letter of attorney 657
public and private restriction of authority 658
agent's authority limited by law 659

AGENCY — *Continued.* SECTION
when parties bound to inquire into extent of agent's authority 660–662
distinction between agency, general and special . . . 663
transactions requiring scrutiny of agent's authority . . 664
avoidance of knowledge of limitation of agent's authority 665
to negotiate bills and notes 666
effect of subsequent ratification with notice 667
binds principal 668
silent acquiescence releases agent 669
contracts in name of agent binding 670
principal bound, though concealed or revoked — husband and wife 671
must extend to duty undertaken to bind principal . . . 620

AGENT,
acts of, governed by notice to principal 551
Notice to 31–33, 672–695
governed by the rules applicable to actual notice . . . 31–33
is notice to principal 480*l*, 672
general application of the rule 673
when actual notice required 673*a*
effect of, depends on nature of agency 674
executive officer of a bank 675
sufficient to put principal on inquiry — trustees . 676, note 2
agent's unlawful acts, principal charged with notice of . 677
bind principal to those misled by principal's acts . . 678
when husband of the principal 679
confined to transactions in which he is active . . . 680
to one of several, sufficient 681
when one of the directors of a bank 682
corporation not affected with every fact known to 683, 683*a*
joint purchasers do not sustain relation of principal and agent 684
is the same kind of notice to principal 685
of agent, insufficient 686
place, manner and time of acquiring knowledge . . . 687
whether knowledge present to the mind of agent at the time, the controlling circumstance 688
when not necessary to be acquired during agency . . 689
agent's duty to communicate to principal 690
where authority depends upon ratification 691
when attorney, and cannot be disclosed without breach of confidence 692
executor and administrator 693
to trustee before creation of trust 694

AGENT — *Continued.* SECTION
of torts of other agents and servants 695
of dissolution of partnership 502
of dishonor of commercial paper 743–750, 754
See BILLS AND NOTES.
Notice of dishonor of, to whom given.
time of giving 817
Notice by 696–701
has the same force as when given by principal 696
of dishonor of commercial paper 697
when resident in same place as party notified 913
See BILLS AND NOTES.
Notice of dishonor of, by whom given.
to quit 698
written or verbal 699
effect of subsequent ratification 700
valid only from time of 701
of stoppage *in transitu* 480
service of original process on 1302–1310
See SERVICE.
AGREEMENT,
to mortgage is recordable 111
what implied between landlord and tenant 587
ALIMONY,
action for, *lis pendens* 352
divorce and, actions for, service of process by publication . 1083
will not authorize personal judgment 1142
ALTERATION,
of notice, after service 1252
of signs, amounts to notice of dissolution of partnership . 503
AMBIGUITIES,
in notice of dishonor, not fatal 840
AMENDMENT,
of pleading, not allowed after publication of process . . 1050
of return, when allowed 1381
AMERICAN,
registry acts, objects of 96
rule as to notice limiting carrier's liability 541, 552
AMOUNT,
of guaranty uncertain 396, 400, 419
definiteness of 398
of tax due, should be stated in advertisement 1009
ANIMALS,
dangerous, owners of affected by notice 480*i*

APPEAL, SECTION
Notice of 1208–1220
not always required 1208
written and served upon attorney 1209
in criminal cases 1210
from suits before justices of the peace 1211
when notice serves as an assignment of errors 1212
grounds of appeal to be stated in 1213
assent to judgment required in 1214
served on same day as filed — California 1215
must be given in time 1216
personal service of, not required 1217
to be given to co-parties 1218
does not depend upon conflict of interest 1219
waived by appearance 1220
motion to dismiss, special notice of, not required 1191

APPEARANCE,
waives original process . . . . . 1161 (note 2), 1358
notice to take depositions, when 1253
notice of motion 1203
notice of appeal 1220
special does not amount to waiver 1358

ARRIVAL,
of goods, and demand by consignee, ends transit 461
notice of, given by carriers 562–577
will terminate liability as carriers 563
reasonable time for removal after 564
classification of conflicting authorities 565
in Massachusetts, Illinois, Iowa, held unnecessary . . . 566
modification of the rule in Massachusetts 567
New Jersey and Vermont, reasonable time to remove . 568
additional authorities, to same point 569
New York, Michigan, Texas and New Hampshire, required 570
required of carriers by water 571
comparison of conflicting views 572
rule requiring notice 573
difference in local customs 574
rule affected by custom 575
waiver and excuse of 576
what is reasonable time for removal 577

ARTS,
facts connected with the, judicially noticed 1417

ASSENT,
to judgment required in notice of appeal 1214
to be binding, must be voluntary, and with notice of rule limiting liability of carriers 555–557

ASSESSMENT, SECTION
special, advertisement of notice of sale for 1124
of damages to property, requires notice to owner . . . 1139

ASSIGNEE,
of mortgage regarded as purchaser 262
in bankruptcy, notice to, of dishonor of bill or note . . 769, 770
notice of dishonor by 725
of chose in action takes, subject to equities 431

ASSIGNMENT,
deed of, when recordable 115
of lease 116
of mortgage 117
for benefit of creditors, not recordable 120
of choses in action, notice of 428–450
definition of choses in action 428
not assignable at common law 429
assignment transfers claim 430
assignee takes, subject to equities 431
effect of, to debtor 432
assignment incomplete without 433
the English rule 433, 436
held necessary as against creditors 434
objects of 435
assignee has no greater right than his assignor had . . 436
by whom given 437
presumed from circumstances 438
after notice of fraudulent issue to assignor will not affect rights of parties 439
double purpose of 440
oral or written 437
of over-due negotiable bills and notes, requires notice . . 441
negotiable paper, unindorsed require 442
balance due on account 443
policies of insurance 444
notice to insurer 445
conditions of policy 446
of subject of insurance 447
by retiring partners 448
notice of, may be implied 449
after loss 450
for benefit of creditors, of maker of note, will not excuse notice of dishonor 949
of errors, notice of appeal serves as 1212

ASSUMPSIT,
when in action of, notice to produce books and papers unnecessary 1264

ATTACHMENT, SECTION
grounds of, stated in affidavit for order of publication 1226–1237
See PROCESS, ORIGINAL.
of funds in hands of drawee, no excuse for failure of notice of dishonor 1027
ATTORNEY,
service of notice of trial on 1172
return of service upon, what sufficient 1248
service of notice on, in matters of practice 1321–1323
in suits before justice of the peace 1322
should not be where his connection with case has ceased 1323
AUCTIONEER,
acceptance of proposal by, notice of 381
AVERMENTS,
in pleading, necessary to obtain order of publication 1049–50, 1057
of notice in pleading, when, and when not, necessary 1386–1406
See PLEADING.
AVOIDANCE,
of knowledge, notice may be inferred from 89
BAILEES,
notice to, of delivery of thing bailed 452–456
See CARRIERS AND OTHER BAILEES.
of vendor's right of stoppage in *transitu* 457–480
See STOPPAGE IN TRANSITU.
BAILIFF,
or servant of landlord, not entitled to notice to quit . . . 595
BANKING CORPORATION,
notified through its executive officer 675
notice to directors of, will bind when, ... 682, 683
BANKRUPTCY,
of holder, by whom notice of dishonor may be given . 725, 726
of drawer or indorser, to whom notice may be given . 769–772
of acceptor, no excuse for failure to give notice of dishonor 771
dissolution of partnership by 497
BILL OF LADING,
effect of assignment of, upon consignors' rights 472
when notice limiting carriers' liability printed on, insufficient 548
BILLS AND NOTES,
negotiable, purchasers of, how affected with notice . . . 80–94
See PURCHASERS.
Notice of dishonor of 702–1028
By whom may be given 702–728
generally by holder 702

BILLS AND NOTES — *Continued.* SECTION
by any party to the instrument 703
criticism of authorities by Judge Story 704
party discharged becomes stranger to bill 705
party not notified, not immediately discharged . . . 706
time must have elapsed within which should have been notified 706
by any party, entitled to reimbursement on paying 707, 709
given by party before received 708
cannot be waived by party once discharged, so as to render his notice valid 708
by acceptor 710
by acceptor, *supra* protest 711
by drawer of bill 712
by maker of note 713
by an agent 714
for collection, or by notary 715
when by holder, need not be owner 716
by successive agents to each other 717
will not be affected by signing wrong name . . . 718
must have authority from party whose name is used 719
authority implied 720
by one holding as security 721
ratification by holder of act of stranger 722
by one without knowledge when given 723
by executor or administrator 724
by assignee in bankruptcy 725
when by bankrupt 726
by guardian or ward 727
by married woman 728
To whom given 729–775
to drawers and indorsers — reason for rule 729
drawer of bill 730
should not be waived by agent 731
when not entitled to notice 732
drawn upon partnership by member of firm . . 733
to indorser 734
need not be indorser for value 735
to any antecedent party 736
may be of partial dishonor 737
to indorsers of over-due paper 738
the same reasons apply as in case of dishonor of paper indorsed before maturity 739
indorser who re-issues dishonored paper not entitled to . 740
purchase at indorser's request, notice unnecessary . . 741
transferrer by delivery not entitled to 742

BILLS AND NOTES — *Continued.* SECTION
to agent 743
authority of, to receive, what sufficient 744
may be implied 745
question of fact 746
when inferred from nature of general authority . . 747
appointed prior to war, may be notified after hostilities commenced 748
authority to receive, what held insufficient 749
not implied from authority to indorse 750
to partners 751
indorsement during partnership 752
after dissolution 753
to agent of one of the partners 754
to surviving partner 755
exception to the rule of, binding both by serving one 756
to joint indorsers, not partners, not by service on one . 757
agency not implied from joint indorsement . . . 758
consequences of failure to notify both 759
assumption of authority by one, binds himself . . 760
admission of proper notice by one of two 761
joint administrators cannot tie their hands 762
to personal representatives 763
how addressed to and served 764–768
in case of bankruptcy, party liable 769
before selection of assignee 770
no excuse for failure of notice 771
after assignment, might be to bankrupt 772
to infant party 773
to married woman 774
to insane drawer or indorser 775
time of giving 776–827
importance of question of 776
rules of, settled by repeated decisions 777
division of subject 778
must be subsequent to dishonor 779
effect of payment on day of dishonor 780
may be on last day of grace 781
note dishonored on last day of grace when payment *refused* 782
by *failure* to pay on presentment 783
by failure and qualified refusal 784
to resident of same place as holder 785
time of delivery and not of sending 786
at place of business or residence 787
hours at place of business 788

BILLS AND NOTES — *Continued.* SECTION
hours at place of residence 789
nine o'clock, P. M 790
when left on day of dishonor 791
to parties resident in different place from holder . . . 792
by mail, time of depositing letter 793
general construction of "reasonable time" 794
each party has his "day" 795
not required to neglect other business to give . . . 796
the "day" of one party not for the benefit of another 797
consequence of numerous parties taking one day . 798
time not always measured by number of indorsers . 799
difficulties in applying the rule 800
Chitty's doctrine as to "next day," by first mail . . 801
twenty-four-hour rule of Judge Story 802
impracticability of Chitty's rule 803
inconvenience of twenty-four-hour rule 804
judicial interpretation of "next day" 805
what is unreasonably early hour depends upon local custom 806
the hour of closing the mail 807
five o'clock held too early 808
seven o'clock held too early 809
six o'clock the hour of closing 810
ten minutes past nine o'clock 811
might be earlier than nine 812
half-past nine held too early 813
construction of rule by Chief Justice Marshall . 814
not necessarily by first mail of next day 815
where no mail on next day deposited in time for *next* mail 816
agents or attorneys have their day 817
must be secular day 818
Jewish festival 819
Sunday 820
time referred to hour of mailing 821
governed by law of place of contract 822
consequences of adopting unusual modes 823
general rule one of enlargement rather than of restriction 824
waiver and excuse 825
deductions from authorities cited 826
no exceptions to rule requiring notice in reasonable time 827
Manner and mode of giving 828–929
division of subject 828
where and how sufficiently served, if duly received . . 829
by post to residents of same place 830

BILLS AND NOTES — *Continued.* SECTION
whether written or oral 831
verbal notice delivered to wife 832
should be written to distant parties 833
form and contents 834
no form prescribed 835
immaterial omissions 836
date of maturity 837
name of payee 838
clerical errors 839
mere ambiguities 840
must show presentment on business day 841
signed by one having authority 842
where, and how served 843
parties residing in same place 844
indorser temporarily absent from home 845
what constitutes a place of business 846
personally upon resident of same place, when place of residence known 847
by post on resident of same place, delivery must be proved 848
different meanings of the word "town" 849
by post, between residents of different villages in same town 850
leaving at residence or place of business 851
residence in one place, business in another 852
"place of business" and "residence," and what amounts to leaving at either 853
residence 854
need not be domicile 855
leaving notice at 856
boarding-house 857
at counting house, with pretended agent . . . 858
will not suffice to leave *near* the place 859, 860
corresponding numbers not sufficient to identify place 861
several places of business, either will suffice 862
holder may elect between place of business and residence 863
may be left, when no one there to receive it 864
must be the proprietor of place of business 865
office of directors of corporation 866, 867
difference in time, at residence or place of business . . 868
by mail between residents of the same place 869
letter carriers 870
drop-letters required to be stamped 871
penny post 872
in Baltimore, and other large cities 873

BILLS AND NOTES — *Continued.* SECTION
established custom of bank 874
when authorized by indorser 875
by mail to parties residing near place of dishonor . . 876, 877
partners — one residing in, and one near, place of dishonor 878
cases requiring personal notice to indorser residing in neighborhood 879
residing three miles distant 880
personal, where party resides at great distance from any postoffice 881
parties residing *near* different post towns . . . 882
office to which indorser usually resorts 883
general adoption of service by mail 884
exceptional case 885
necessity of a rule 886
by male to different places in same town 887
general direction to town postoffice, *prima facie* sufficient 888
private messenger 889
addressed to residence or place of business when known . 890
must be addressed to place of residence 891
may be notified at pretended place of residence . . . 892
exception to cases where mail most convenient mode . . 893
when holder may choose between places 894–896
cases governed by question of distance 897
criticism of, and true rule laid down 898
by mail 899–929
to principal office of parish 899
to county seat 900
to principal office of town 901
inquiry should be made for residence 902, 903
sufficiency of, question for jury 904
to transient indorser, may be at temporary residence . 905
but not when he has a permanent place of abode . . 906
member of congress, when, and how should be served . 907
when sufficient, if sent to last known residence . . . 908
diligent inquiry for unknown residence 909
inclosing notices to all, in letter to last indorser . . . 910
transitory place of business 911
through non-resident agent, between residents of same place 912
from resident agent, of non-resident holder 913
through successive indorsers between parties residing in same place 914
sending, without inquiry, to place of payment, insufficient 915

BILLS AND NOTES — *Continued.* SECTION
information sufficient to put upon inquiry 916
inquiry, sufficient and insufficient 917–921
to certain place on the strength of previously acquired knowledge 922, 923
address by surname alone, insufficient 924
delay chargeable to indorser 925
holder misled by place of date 926
address should include name of state 927
to place designated by indorser 928
delay from sending by usual route 929
Waiver and excuse of 930–1028
general character of waiver 930
division of subject 931
waiver may be antecedent or subsequent 932
antecedent waiver in writing 933
effect of "protest waived" 934
"I waive demand of protest" 935
may be embodied in the instrument — will not excuse presentment 936
no special form required 937
by letter 938
may be verbal 939
established by circumstances 940
by promise to the maker to pay 941
when promise supported by consideration 942
indemnity taken does not always waive 943
reservation of title to real estate, for which note given 944
when depends upon sufficiency of indemnity 945
indemnity taken by indorser is for his own security . 946, 947
indorser with funds of maker does not become principal . 948
assignment to trustee will not excuse 949
taking mortgage of all makers' property held no waiver 950
indemnity taken furnishes stronger reason for notice . 951, 952
indorsement of renewal note, not accepted, no waiver . 953
request no waiver when not acceded to 954
by first indorser does not bind subsequent 955
subsequent promise, effect of, conflicting views as to . 956
conditions of 957
when made without knowledge, no waiver . . . 958
express and implied 959
implied 960
promise to see it paid held sufficient 961
recitals in contract of party acknowledging bill . 962
must be unequivocal 963

BILLS AND NOTES — *Continued.* SECTION
admissions to strangers do not amount to . . . 964
anxiety to have bill paid, no waiver 965
held evidence of prior notice 966
held no evidence of notice, but might waive . . . 967
even written admission not conclusive 968
either waiver or admission 969
onus probandi 970, 973
prima facie evidence of diligence 971
of knowledge of *laches* 972
principles governing the question 974
knowledge of facts, and not their legal effect, necessary to bind subsequent promisor 975
excuses of a general nature enumerated 976
inevitable accident 978
prevalence of malignant fever 979
existence of war 980
interdiction of commerce 981
actual hostilities 982
late war 983
interruption of postal communication 984
existence of war, where note payable 985
if intercourse legal, no excuse 986
loss of note by, no excuse 987
when obstruction removed, party entitled to . . 988, 992
party not required to violate law of his domicile . . 989
failure to find after diligent inquiry 990
facts excusing presentment will not always excuse failure of notice 991
death of holder 993
sudden sickness, and death of agent 994, 995
excuses of a special character, enumerated 977
special excuses — treated as waiver 996
bill drawn for benefit of drawer 997
accommodation note or bill 998, 999
mere understanding between drawer and drawee, that former shall pay, will not excuse 1000
no funds in hands of drawee, when will excuse . 1001, 1009
application of the rule confined 1002
drawer has no right to anticipate payment 1004
bill drawn against goods in transit 1005
amount in hands of drawee grossly inadequate . . . 1006
where drawer has been informed that draft would not be paid 1007
where drawer indebted, but amount not yet due . . 1008
expectation of payment must continue to maturity . 1009

BILLS AND NOTES — *Continued.* SECTION
payment need not be anticipated from drawee . . . 1010
may be anticipated from drawee's promise 1011
when drawee has already honored drafts 1012
running account between parties 1013
suspecting absence of funds, no excuse 1014
drawer being in debt to drawee, no excuse 1015
no expectation of funds *at the place*, no excuse . . . 1016
want of funds will not excuse failure to notify indorser 1017
though he be accommodation indorser 1018
otherwise where indorsement is made with notice of facts sufficient to excuse 1019
former partnership between drawer and drawee, no excuse 1020
partner drawing upon his firm not entitled to notice . 1021
that goods purchased are for use of firm, will not excuse notice of dishonor of note, given for 1022
fraud practiced by indorser, will excuse failure of notice 1023
motives for indorsement immaterial 1024
adding the word "surety," will not excuse 1025
presence of indorser at refusal, will not excuse . . . 1026
attachment of funds in hands of drawee, no excuse . 1027
notice not required of dishonor of void note 1028

BOARDING-HOUSE,
when place of residence of party to bill, notice may be left at 857

BONDS,
negotiable, notice of defenses to, through trustees, . 676, note 2
notice to produce, in actions on, unnecessary 1265
motion for judgment on, notice of 1197

BOOKS,
and records constituting link in chain of title, notice from. 326

BOOKS AND PAPERS,
notice to produce, to be offered in evidence . . . 1257–1292
general remarks 1257
necessary to the admission of secondary evidence . . . 1258
demand before suit brought, not sufficient 1259
necessary when papers recorded 1260
rule same in criminal prosecution 1261
exceptions 1262
in action of trover, unnecessary 1263
in *assumpsit*, unnecessary 1264
debt on bond, unnecessary 1265
action of covenant, unnecessary 1266

BOOKS AND PAPERS — *Continued.* SECTION
against constable for making return, unnecessary . . 1267
papers filed or mentioned in pleadings 1268
papers in court 1269
paper must be traced to opposite party 1270
proof of possession from circumstances 1271
papers under control of adversary 1272
privity of party notified, with party in possession, must be proven 1273
property passed out of party's possession 1274
party failing to produce may impeach copy 1275
not by introduction of original 1276
secondary evidence, where possession of paper disclaimed 1277
production is not an admission of genuineness of signature 1278
original need not be offered after production 1279
inference drawn from failure to produce 1280
notice to produce notice, unnecessary 1281
contents of notice 1282
should not be too general 1283
general, required to be in writing 1284
renewal unnecessary in case of continuance 1285
time of notice to produce 1286
served at trial — too late 1287
party notified not required to incur expense 1287
original not in existence, time of service immaterial . 1289
may be served upon opposite attorney, when 1290
may be served upon either of several joint parties . . 1291
personal service not indispensable 1292

BRIDGES,
notice to repair 480*g*
See HIGHWAYS.

BUSINESS,
place of leaving notice of dishonor,
See BILLS AND NOTES.

CARRIERS,
Notice by, limiting their liability 531–577
division of subject. 1. Restricting their liability as insurers. 2. Terminating their liability as carriers . . 531
when their liability to consignor has its inception . . . 532
upon delivery of goods for transportation — rule not affected by public notice 533
nature of common law liability 534
different methods of giving 535
state of the law in England 536

CARRIERS — *Continued.* SECTION
where notice held sufficient, must be brought home to consignor 537
posting insufficient, unless notice read 538–540
American rule — must be clear and explicit 541
value required to be stated, to fix cost of carriage . . 542
printed on railroad ticket 543
must be seen and understood 544–546, 548
to whom given — agent or servant 547
must be seen and assented to when printed on bill of lading 548
when several conflicting, bound by least favorable to one giving 549, 550
to owner, will affect transactions by agent to whom not communicated 551
general doctrine in America, cannot be limited by . . 552
may be by contract 553
notice and assent amounts to 554
assent must be voluntary 555–557
will not exempt from liability for negligence . . . 558–561
even where assent raises a contract 558
notice of arrival 562–577
actual — opportunity to remove goods 577*a*
See ARRIVAL.
of letters, when notice of dishonor delivered by . . 870

CARRIERS AND OTHER BAILEES,
Notice to 451–480
division of subject 451
of delivery of goods for carriage 452
in what cases required when goods deposited at public wharf 453
will only bind carrier when he consents to receive them 454
when so delivered pursuant to previous understanding 455
not necessary when delivered on carrier's private wharf 456
stopping *in transitu* 457–480
See STOPPAGE IN TRANSITU.
of facts requiring extraordinary care 480*a*
of loss by shippers 480*b*

CERTAINTY,
as to facts communicated, sufficient if may be rendered certain by inquiry 30
of description in mortgage, what sufficient 180–185
in recitals of title papers, reasonable degree of, required to affect purchasers 316–321

CERTIFICATE, SECTION
of emancipation not recordable 121
of official character of officer taking acknowledgment, required 126

CHAIN OF TITLE,
instrument must be in some, for record to operate as notice 205, 206
effect of missing link 207
record imparts no notice of relations between parties . 208
example of broken 210–212
sheriff's deed of interest of apparent stranger, is not notice 213
record of conveyance, anterior to grantor's acquisition of title 214–216

CHANCERY PROCEEDINGS,
in United States courts, how notice of served 1356
when of summary nature, party entitled to notice of . . 1140

CHATTEL MORTGAGE,
notice of, by registration, and of unregistered 77
deposit of, in wrong town, will not affect purchasers with notice 194
effect of registry, as notice, follows property to another state 244
unrecorded, held good against attaching creditors with notice 271

CHATTELS,
purchasers of, with and without notice of title adverse to grantor 67
innocent pledgee 68
mere possession not conclusive evidence of title . . . 69
innocent purchaser from broker unaffected by secret instructions from principal 70
secret lien for purchase money ineffectual 71
conditional sales 72–76
See CONDITIONAL SALES.
not affected by, including in recorded deed to real estate 336
possession of, notice to purchasers of rights of possessor 78, 306
notice to custodian of their transfer 441

CHOSES IN ACTION.
purchaser charged with notice of equities against . . . 79
notice of assignment of 428–450
See ASSIGNMENT.

CLERICAL ERRORS. SECTION
will not always vitiate notice of dishonor of commercial paper 839
when not misleading, will not vitiate notice of taking depositions 1225
CLERK,
of municipality, service on; insufficient 1313
COMMERCE,
interdiction of, excuses notice of dishonor of negotiable instruments 981
COMMERCIAL PAPER,
notice of dishonor of,
See BILLS AND NOTES.
COMMON CARRIERS,
See CARRIERS.
COMPUTATION OF TIME,
of publication of notice 1070
of notice to take depositions 1235
of service 1330, 1331
CONCEALMENT,
of agency will not exonerate principal 671
CONDITIONAL SALES,
purchasers from conditional vendee charged with notice . 72
property held in pledge, subject to rights of pledgor . . 73
condition binding when by parol 74
property may be unclaimed in an altered state 75
caveat emptor 76
CONDITIONS,
of a mortgage insufficiently expressed, registry void . . 179
of waiver of notice of dishonor of commercial paper . . 957
of insurance policy, assigned subject to 446
CONSENT,
to postponement of taking depositions 1250
to shortening the time of taking depositions 1251
CONGRESS,
notice of dishonor of bills, how served on member of . . 907
CONSIDERATION,
payment of, necessary to protection of purchaser of negotiable instrument before maturity 93
notice of want or failure of 94*a*
want of, does not affect registration of deed 122, 123
payment of, no protection to purchaser *pendente lite* . . 347
necessary to support assignment of bill of lading as against creditors 473

CONSIGNEE, SECTION
notice of rights of, adverse to consignors 458–480
See STOPPAGE IN TRANSITU.
possession by, ends transit 466

CONSTRUCTIVE NOTICE,
definitions of 37–39
held same as implied notice 38
when prescribed by statute 39
distinctions between, and actual, express or implied . . 40
different kinds of 41
is an inference of law 42
of contents of writing, to person executing 43
possession held as 44
to purchasers *pendente lite* 45 339
See LIS PENDENS.
of recitals in title papers 46, 309
from possession of deeds 47

CONSTRUCTIVE POSSESSION,
as notice of claim of title 286, 288

CONTINUANCE,
of case does not require renewal of notice to produce . . 1285

CONTRACT,
to convey, prior and subsequent, effect of notice 55
executory, when not entitled to registration 122, 123
notice of, by recital in title papers 329
actions for specific performance of — *lis pendens* 342*a*
completed by notice of acceptance of proposal 378
carriers may limit their common law liabilities by . . 353–357
See CARRIERS.
in agent's name may bind principal 670
acknowledging bill of exchange held waiver of notice . . 952
for public improvements, notice by publication 1123
certain liabilities arising in, fixed by notice 480*l*–480*o*
of indemnity 480*l*
measure of damages affected by notice 480*m*
notice of usage or custom 480*n*, 480*o*

CONVEYANCES,
unregistered, purchasers with notice of 64
See UNREGISTERED INSTRUMENTS.
between strangers to title, registry does not affect purchasers 223
by statute — execution sale 327
registration of 95–272
See REGISTRATION OF INSTRUMENTS.

CONVICTS, SECTION
service of notice upon 1317

CORPORATIONS,
formed by partners, members individually liable 488
notice *by*, to quit 622
notice *to*, to quit 628
not affected with notice of every fact known to directors 683, 683*a*
notice to, through executive officers 683*b*
office of, the place of business of directors 866, 867
foreign, how served with process 1303–1308
domestic, how served with process 1309–1311
See JURISDICTION.
municipal, service of notice on 1312, 1313

COURT,
when sufficiently designated in notice 1210
judicial notice of terms of 1414

COVENANT,
action of, when notice to produce books and papers unnecessary 1266

CREDITOR,
purchasing at execution sale, charged with notice by prior registry 228–235
charged with notice of unregistered deed by prior information 264
affected with notice of unregistered chattel mortgage . . 271
affected with notice by possession 305

CREDITORS' BILL,
to operate as *lis pendens* must be definite in description 303, 342*a*

CUSTOMS,
notice of, that affects party to contract 480*o*
of community that control consignee's right to notice of arrival of goods 576
of which judicial notice is taken 1404
of which judicial notice is not taken 1405, 1408

DAMAGES,
measure of, for breach of contract affected by notice . . 480*m*

DANGEROUS ANIMALS,
liability of owner of fixed by notice 480*i*

DAY,
party entitled to one, for giving notice of dishonor of bills and notes 794–805
general construction of "reasonable time" 794

DAY — *Continued.* SECTION
each party has his day 795
statement of rule by Ellenborough 796
the "day" of one party not for the benefit of another 797
consequences of numerous parties taking one day . . 798
time not always measured by number of parties . . 799
difficulties in applying the rule of one day to give notice 800
Chitty's doctrine as to "next day" 801
criticism of Chitty, by Story — twenty-four hours . 802
impracticability of Chitty's rule 803
inconvenience of twenty-four hour rule 804
judicial construction of "next day" 805
agents or attorneys have one, for giving notice of dishonor 817
must be secular day 818
Jewish festival 819
Sunday 820

DEATH,
of partner, dissolves partnership, notice unnecessary . . 496

DEBT,
action of — when notice to produce books and papers unnecessary 1266

DECREE IN CHANCERY,
summary proceedings to obtain, require notice 1140

DEED,
possession of, as notice of rights of possessor 46, 56
registry of, as notice to purchasers,
See REGISTRATION OF INSTRUMENTS.
of assignment, should be recorded 115
with defeasance, is mortgage and should be so recorded 187–189
sheriff's, recorded as mortgage, will not operate as notice . 190
unregistered, notice of,
See UNREGISTERED INSTRUMENTS.
notice from recitals in,
See TITLE PAPERS.

DEFEASANCE,
deed with, should be recorded as mortgage, to operate as notice to purchasers 187–189
by parol, deed recorded as mortgage 189

DEFENDANT,
should be named in original process 1152
when omission of name held immaterial 1153
when infant — how served with process 1158

DEFINITION, SECTION
of actual notice 3
of constructive notice 37

DELIVERY,
of instrument necessary to give effect to registry as notice 141–143
after recording 142
effect of 143
of goods for transportation, notice to carriers of . . . 452–456
See CARRIERS.
when negotiable paper passes by, transferrers not entitled to notice 742

DELAY,
in sending notice of dishonor by usual route 929

DEMAND,
on principal, and notice, to bind guarantor,
See GUARANTY.
for indemnity, after loss of insured property, notice of assignment of 450
by consignee, ends transit of goods 462
See STOPPAGE IN TRANSITU.
for books and papers to be used in evidence, will not dispense with notice to produce 1259

DEPOSITIONS,
Notice of taking 1221–1256
when required 1221
generally in writing 1222
what to contain 1223
deemed sufficient 1224
clerical errors in 1225
name of officer 1226
witnesses need not all be named 1227
conditional — insufficient 1228
must be signed 1229
time of taking 1230
mistake in date of taking 1231
general requisites 1232
time of service 1233
decided by the court 1234
computation of time and distance 1235
absence of statute or rule 1236
not always governed by distance 1237
not fixed by special circumstances 1238
except when unusually short 1239
fixed by statute, may be shortened by the court . . 1240

DEPOSITIONS — *Continued.* SECTION
objections on account of shortness of, when made . 1241
party objecting must show himself entitled to time 1242
service of 1243, 1300, 1301
insufficient 1244
upon several co-parties 1245
strict personal, not required 1246
proof of 1247
upon attorneys in partnership 1248
when deposition to be used in two cases 1249
postponement by consent 1250
effect of acknowledgment of service 1251
alteration of 1252
objections waived 1253
by presence at taking 1254
party may be present without waiver 1255
effect of adjournment without consent 1256

DESCRIPTION,
in title papers, sufficient to give notice to purchasers . 318–320
of property, in original process by publication 1059
in published notice of judicial sale 1088
of debt in mortgage, what is sufficient 180–185
errors in, how registry of instruments affected by,
See REGISTRATION OF INSTRUMENTS.

DESTRUCTION,
of records, does not affect notice by prior registration . . 157

DILIGENCE,
purchaser of real or personal property, put upon inquiry,
bound to exercise 17
imputation of bad faith from want of 11
purchaser of negotiable instruments bound to exercise . . 87
in prosecution of suit, necessary to notice by *lis pendens* 357–359
of holder of bill or note in presenting for acceptance or pay-
ment, and giving notice 990, 991

DIRECTOR,
of bank, notice to, affects corporation 682
corporation not affected with knowledge of every fact
known to 683, 683*a*
of corporation, place of business of, where notice may be
served 866

DISHONOR,
Of commercial paper, notice of, ... Ch. VI, §§ 702–1028
by whom given 702–728
to whom given 729–775

DISHONOR — *Continued.* SECTION
time of giving 776–827
manner and mode of giving 828–929
waiver and excuse 930–1028
See BILLS AND NOTES.

DISMISSAL,
of suit, effect of, upon notice by *lis pendens* 358

DISSOLUTION OF PARTNERSHIP,
Notice of 481–530
general nature of partnership 481
range of inquiry 482
reason for requiring notice 483
personal notice, oral or written 484
knowledge derived from circumstances 485
use of name after retirement 486
effect of legal notice of dissolution 487
corporation using partnership name 488
unnecessary to those ignorant of the partnership . . 489, 490
general knowledge of partnership sufficient 491
dormant partners 492
dormant with respect to particular transaction . . . 493
must be unknown 494
known to some, unknown to others 495
dissolution by death 496
dissolution by bankruptcy 497
effect upon surviving or solvent partners 498
manner of giving 499
communication by mail 500
when not conclusive unless received 501
to agent or servant 502
altering signs, etc. 503
public advertisement 504
publication insufficient to affect those having prior dealings 505
reading papers not conclusive 506
inference drawn from publication 507
what are "prior dealings" 508
discounting notes 509
honoring successive drafts 510
renewal of accommodation paper 511
single purchase 512
to new customers 513
time of publication 514
publication in newspaper 515
when published 516

DISSOLUTION OF PARTNERSHIP — *Continued.* SECTION
selection of newspaper 517
manner open to inquiry 518
English and American doctrine 519
liability of retiring partner affected by subsequent conduct 520
estoppel 521
example of new customer entitled to actual notice . . 522
knowledge of expiration of partnership 523
notice of limited partnership 524
special partnership 525
restrictions and limitations 526
assumption of excess of authority by one partner . . . 527
misapplication of funds 528
effect of dissolution upon guarantors 529
Onus probandi 530

DIVERSION,
of accommodation paper, notice of 94*b*

DIVORCE,
and alimony, in suits for, service by publication 1083

DRAWER,
of bill, notice of dishonor should be given 729, 730
See BILLS AND NOTES.

EASEMENT,
possession is notice to purchasers of reservation of . . . 300

EJECTMENT,
pendency of action of, notice to purchasers 343
of warrantee of title, and notice to warrantor . . 480*c*–480*f*

EMPLOYEE,
misconduct of, liability of employer for fixed by notice . 480*k*

ENGLISH REGISTRY LAWS,
decisions under, as to the effect of registration 104–106, 110–111

EQUITABLE INTEREST,
effect of filing conveyance of, for record 254
notice to purchasers of 97
See PURCHASERS.

EQUITABLE MORTGAGES,
under English and Irish registry acts 105–109

ERRORS,
in record of instrument, how registry affected by . . . 147
in description 148, 149, 159
after filing for record 149
to whom is the officer responsible for 150

ERRORS — *Continued.* SECTION
notice unaffected by 152
partial omission 153
entire omission 154
early American authorities 155, 156
in amount secured by mortgage 158
fraudulent concealment by officer 160
immaterial, or clerical, will not affect registry 161
principle governing question. 162
failure to record in proper time 163
in indexing records 164–173
See INDEX.
or omission in instrument filed for record, effect of, when misleading 174
insufficient description 175
in numbering tracts 176
in description of chattels 177
of debt due on mortgage 178
when conditions insufficiently expressed 179
when with sufficient certainty 180–185
in sheriff's return of judicial sale, effect of 1094
in return of process, cured by amendment 1381
when immaterial 1369

EVIDENCE,
of title, possession is,
See POSSESSION.
notice to produce books and papers to be used in . . 1257–1292
See BOOKS AND PAPERS.
secondary, of written instrument, when admissible . . . 1258
parol, in aid of defective return of process 1383

EXCUSES,
for failure of notice of dishonor of commercial paper . 976–1028
of a general nature, enumerated 976
inevitable accident 978
prevalence of malignant fever 979
existence of war 980
interdiction of commerce 981
actual hostilities 982
the late war 983
interruption of postal communication 984
war, where note payable 985
will not excuse if intercourse legal 986
loss of note by war, no excuse 987
entitled to notice when obstruction removed . . 988–992
party not required to violate law of his domicile . . 989

EXCUSES — *Continued.* SECTION
absconding of party liable — due diligence required . 990, 991
will not excuse notice of facts excusing demand . . . 991
of a special character enumerated 977
death of holder 993
sudden sickness and death of agent 994
sickness must be sudden and severe 995
treated as waiver 996
bill drawn for benefit of drawer 997
note for accommodation of payee 998
for accommodation of drawee or acceptor 999
not excused by promise of drawee to provide for bill . 1000
no funds in hands of drawee 1001–1003
no right to expect payment 1004
absence of funds, no excuse when payment expected . 1005
balance in hands of drawee not always good grounds for expectation 1006
no reasonable expectation of payment 1007
mere existence of credit insufficient 1008
expectation of payment must continue to maturity 1009
need not be expected from drawee 1010
promise from drawee 1011
where drawee has already honored drafts . . . 1012
running account between parties 1013
suspecting absence of funds, no excuse. 1014
indebtedness of drawer to drawee, no excuse . . . 1015
no expectation of funds *at place of payment*, no excuse 1016
absence of funds, no excuse for failure to notify indorser 1017–1019
former partnership between drawer and drawee, no excuse 1020
partner drawing upon his firm, not entitled to notice 1021
maker and indorser partners, and consideration received by partnership, no excuse 1022
fraud by indorser excuses failure of notice to him . . 1023
motives for indorsement, immaterial 1024
adding word "surety" will not excuse 1025
present when payment refused, no excuse 1026
attachment of funds, no excuse 1027
note void at inception, notice unnecessary 1028

EXCUSE AND WAIVER,
of demand and notice to guarantors 426, 427
of notice of dishonor of commercial paper,
See EXCUSE.
See WAIVER.

EXECUTION SALE, SECTION
purchaser at, being the creditor, held not purchaser for value 228
notified of prior conveyance by registry prior to sale . . 229
interest of mortgagee, not affected by bidding at 230
purchaser at, protected by good faith of creditor 232
registration of deed prior to, gives precedence over judgment lien 239
after purchase at, notice of prior unregistered conveyance, too late 266
notice of, by publication 1086–1104
See JUDICIAL SALES.
EXECUTOR,
notice to 693
EXPRESS NOTICE,
definition of — distinguished from notice by implication . 6, 7
FACTOR,
may give notice of stoppage *in transitu* 477
FACTS,
of which judicial notice is taken 1403–1417
See JUDICIAL NOTICE.
FILING,
of instrument for registry, time within which to take place 101
consequences of delay in 102
effect of error in recording subsequent to 149
instruments for record, notice to purchasers from the time of 162, 201
should be filed in their true character 186–191
should be in proper county 192–195
effect of withdrawing from files after 255
notice of motion, date of 1196
FORECLOSURE,
of mortgages, doctrine of *lis pendens* in actions for . . . 342*a*
suits — service by publication — notice should describe property 1059
FORM,
of notice of dishonor of commercial paper 835
FRAUD,
disregard of notice amounting to 9, 89, 90, 93
of agent, principal not to be benefited by 32
purchaser guilty of, not protected 63
not imputed to one who withholds mortgage from record, with knowledge of subsequent purchaser 253
practiced by agent 257

GARNISHEE, SECTION
affected by notice of prior assignment of chose in action . 434
GEOGRAPHICAL FACTS,
of which judicial notice is taken 1410
GUARANTEE,
notice from, when necessary to fix liability of guarantor, See GUARANTY.
GUARANTOR,
may give notice to carrier, of stoppage *in transitu* . . . 479
what necessary to fix liability of, See GUARANTY.
GUARANTY,
notice of 386–427
different forms of collateral liability 386
division of subject 387
conflicting decisions as to notice of acceptance . . . 388
early authorities 389
guarantor entitled to notice — absolute guaranty . . 390
proposal to guaranty 391
letter of credit held to be proposal 392
reason for notice of proposed guaranty 393
absolute guaranty — notice not required 394
distinction between different kinds of guaranties . . . 395
uncertainty of demand 396
general indefinite letters of credit 397
definiteness of amount 398
guaranty of proposed credit 399
absolute guaranty of uncertain amount 400
notice of acceptance held unnecessary 401
continuing absolute guaranty 402
principles regarded as settled 403
weight of authority 404
rule as to indefinite letters of credit 405
time of giving notice of acceptance 406
notice of action on faith of the guaranty 407
change of manner of reimbursement 408
report of particular transaction, not generally required . 409
notice of state of accounts, on demand of guarantor . 410
notice of principal's failure 411
conflict of authority 412
early Massachusets cases 413
demand and notice held necessary 414
later decisions, *contra* to above 415
Indiana authorities 416
negligence of guarantee 417

GUARANTY — *Continued.* SECTION
rule in Connecticut — absolute guaranty 418
uncertainty of amount 419
means of knowledge within reach of guarantor . . 420
Pennsylvania doctrine 421
guaranty and suretyships 422
deductions from authorities 423
obligation unlimited and uncertain 424
notice required, not same as of dishonor of bills and notes 425
notice excused — reasonable time 426
waiver of notice 427

GUARDIAN,
of holder of bill or note, may give notice of dishonor . . 727

HEIR,
purchaser from, without notice of unregistered deed from ancestors 217–222
protected, the same as though he purchased from ancestor without notice 217
reasons assigned for the rule 218
held not to be protected, because title never descended . 219
the better reason in favor of innocent purchaser from heir 220
review of authorities, *pro* and *con* 221
weight of authority, and governing principle 222

HIGHWAYS,
public liability of municipal corporations for failure to keep in repair 480*g*

HISTORICAL FACTS,
of which judicial notice is taken 1411

HOLDER,
of note or bill, generally the proper party to give notice of dishonor 702
need not be for value 716
may hold as collateral security 721
adoption by, of notice from stranger 722
when may choose between places of sending notice . 894–896
misled by place of date 926

HOURS,
of giving notice of dishonor of negotiable paper, at place of business 788
at place of residence 789–791
nine o'clock P. M., held not too late 790
when left too late on day of dishonor, may serve for next day 791

HOURS — *Continued.* SECTION
unreasonably early, for sending notice of dishonor by mail 806
mail closed before two o'clock A. M., too early 807
five o'clock A. M., too early for business 808
six o'clock the hour of closing, too early 810
ten minutes past nine A. M., held not unreasonably early 811
might be reasonably earlier than nine 812
half-past nine held too early 813
of closing mail determines whether notice should be sent thereby 807, 814
of mailing notice of dishonor, to non-resident, will determine whether in time 821

HUSBAND AND WIFE,
relative rights and liabilities of, affected by law of agency . 671
wife affected with notice by knowledge of husband . . 679
confined to transactions in which he is active . . . 680

IGNORANCE,
voluntary, imputed to one neglecting to make inquiry . . 279

IMPLICATION,
notice by 8–36
insufficient to affect purchaser of real estate . . . 245–252
sufficient to affect purchasers of real estate 249–251
of authority of agent to give notice of dishonor 720

INDEMNITY,
contracts of, affected by notice 480*l*
measure of damages 480*m*
taken by indorser, not always a waiver of notice. . . 943–952

INDEX,
to record of instrument, effect of 164
failure to, does not affect record 165
effect of indexing under Iowa statute 167
sufficient to put upon inquiry 168
held part of record 169
making of, an official act of which grantor has no control . 170
mortgagee not affected by officer's failure to 171
held no part of the record 172, 173

INDORSEMENT,
by partnership — notice of dishonor 752
of renewal note considered as waiving notice 953
See INDORSER.
See BILLS AND NOTES.

INDORSER,
of bill or note, notice of dishonor should be given . 729, 734–741
need not be indorser for value 735

INDORSER — *Continued.* SECTION
may be from any subsequent party 736
case of partial dishonor, liability *pro tanto* 737
over-due negotiable paper, governed by same rule . . 738, 739
when re-issued by indorser, notice of subsequent dishonor unnecessary 740
paper purchased at indorser's request — unnecessary . . 741
when delay in giving notice chargeable to 925–928
waiver of notice by 955
See WAIVER.
when failure of notice to, will, and will not, be excused 1017–1028
See EXCUSES.

INFANT,
notice of dishonor of negotiable instrument by 727
notice of dishonor of negotiable instrument to 773
service upon, of notice or summons 1316
strict conformity to law required 1158

INFERENCE,
of fact, implied notice an 8, 40
of law, constructive notice an 8, 42
of bad faith by jury, from circumstances . . . . . 88, note
from general language of return 1377

INFORMATION,
direct, is express notice 6, 7
sufficient to put upon inquiry 27
different sources of 28
allaying suspicion, when may be relied on 35
from doubtful sources, effect of reliance upon 36
vague and uncertain, to be disregarded 258

INJUNCTION,
application for, service of notice 1325

INQUIRY,
circumstances sufficient to put purchaser on 10
facts sufficient to excite 13
knowledge of trust sufficient to put purchaser upon . . . 21, 22
inadequacy of price sufficient to excite 23, 24
relationship between parties will put purchaser on . . . 25
excited by notice of partnership interest in property purchased 26
information sufficient to excite 27
when fruitless, purchaser will be protected 34
due 65*a*
facts which excite held inadmissible against purchaser of negotiable instruments 86

INQUIRY — *Continued.* SECTION
excited by inspection of negotiable paper, will affect purchaser 90
examination of records insufficient to protect purchaser . 270
possession sufficient to put purchaser on 276, 277
failure to make — voluntary ignorance 279
excited by recitals in title papers should lead to examination of papers 335
purchaser put upon, as to assignment of choses in action 438, 439
for residence of party to bill or note, necessary before notice dispensed with 915–921

INSTRUMENTS,
the registration of which will operate as notice . . . 113–123
See REGISTRATION OF INSTRUMENTS.

INSURANCE,
notice of assignment of policy of 444–446
effect of transfer of insured property 447–449
by retiring partner 448
notice and assent implied from receipt of premium . . 449
assignment of demand for indemnity, after loss . . . 450
notice of loss 480*l*

INTERCEPTION,
of goods by consignee, ends transit 474

JOINT PURCHASERS,
do not always sustain towards each other the relation of principal and agent 684

JUDGMENT CREDITORS,
rights of, subordinate to those of vendor of goods *in transitu* 475

JUDGMENTS,
given precedence over prior unregistered deeds 238
held not liens upon real estate, superior to prior unregistered conveyances 240
obtained by service of process by publication, only bind property 1084
not subject to collateral attack 1085
against sureties cannot be obtained without process . . . 1141
attacked and set aside for failure of notice of trial . 1176–1179
assented to in the alternative in notice of appeal 1214

JUDICIAL NOTICE OF FACTS,
general view 1403
public statutes, common law and general customs . . . 1404
foreign laws and customs 1405
public treaties 1406
public institutions 1407

JUDICIAL NOTICE OF FACTS — *Continued.* SECTION
local customs, special statutes 1408
municipal ordinances 1409
geographical facts 1410
historical facts 1411
election and appointment of officers 1412
official signatures and seals 1413
terms of court and judicial proceedings 1414
the general course of nature 1415
scientific and other facts of uniform occurrence 1416
facts occurring in the general course of human life, the arts, etc. 1417

JUDICIAL PROCEEDINGS,
parties defendant must have notice of 1138

JUDICIAL SALES,
Notice of, by publication 1086–1104
statutory requirement, merely directory 1086
purchaser with notice 1087
description of property 1088
immaterial omissions in 1089
changing name of paper 1090
several executions in one advertisement 1091
sale may be adjourned 1092
may be had under *alias* execution 1093
error in sheriff's return 1094
publication in paper, when posting required 1095
failure to give notice will not always render sale void . 1096
strict compliance with statute required 1097
sale void for want of proper notice 1098
no uniform rule as to publication of notice of sales . . 1099
time of publication 1100
six weeks' notice 1101
once a week, for three months 1102
what constitutes publication 1103
posting in public places 1104

JURISDICTION,
necessary to be obtained by process, to affect purchasers *pendente lite* with notice 354
holder of legal title must be impleaded 355
should be stated in affidavit or declaration for order of publication 1033
definition of, and how obtained by service of process . . 1161
for purpose of hearing motion for new trial, lost at end of the term 1202

JURISDICTION — *Continued.* SECTION
how obtained by state courts, of foreign corporations . . 1303
must be cause of action arising within the state . . . 1304
reasonableness of rule requiring foreign corporations to accept service 1305
not obtained by federal courts by service on corporations foreign to the district 1306, 1307
how obtained of foreign corporations, in federal courts . . 1308
how obtained of domestic corporations — officers served . 1309
service upon ticket agent of railroad 1310
upon director or station agent 1311
how obtained in action against municipal corporation . . 1312
upon city clerk, insufficient 1313
See SERVICE.
KNOWLEDGE,
distinction between and notice 3
imputed to one who has means of knowing 11
of infirmities of negotiable instrument purchased, a question of fact 85
derived from recitals in muniments of title,
See TITLE PAPERS.
of facts sufficient to excite inquiry, raise inference of notice of assignment 438, 439
of dissolution of partnership, derived from circumstances . 485
of partnership, generally sufficient to entitle one to notice of dissolution 491
of trustee before creation of trust 694
of dishonor, not necessary at time of giving notice . . . 723
previously acquired, of place of residence of party to bill or note 922
of *laches*, subsequent promise must be made with, to amount to waiver of notice 972–975
See BILLS AND NOTES.
See WAIVER.
will not excuse failure to serve original process 1146

LANDLORD AND TENANT,
tenant's possession as notice of landlord's title . . . 281–286
the rights and liabilities growing out of the relation of, affected by notice 578–650
notice to quit — a reciprocal right 578
division of subject 579
statutory provisions 580
nature of tenancy requiring notice 581
from year to year 582
growing out of possession under contract 583

LANDLORD AND TENANT — *Continued.* SECTION
occupancy with owner's consent 584
holding over term 585
lease void under statute of frauds 586
implied agreement sufficient 587
when payment of rent not essential 588
possession by mortgagor after forfeiture 589
general tenancy at will 590
termination of strict tenancy at will 591
mere occupant not entitled to notice 592
contract of purchase by trespasser will not entitle him to notice 593
trespasser negotiating for lease not entitled to notice . 594
bailiff or servant of owner not entitled to notice . . 595
general tenancy at will not created by holding over term 596
tenant for life of another not entitled to notice . . . 597
tenant disputing landlord's title not entitled to notice . 598
grantee of mortgagor not entitled to notice 599
tenancy strictly at will or by sufferance 600
tenancy by the quarter 601
when owner of premises may elect as to nature of tenancy 602
holding over under agreement for new lease 603
proof of tenancy from year to year 604
burthens and benefits equally divided 605
increase of rate 606
time of notice 607
regulated by statute 608
must expire at commencement of new term . . . 609
when tenancy by the quarter 610
tenants from month to month 611
governed by taking possession — principal and accessorial subject of demise 612
the different kinds of uncertain tenancies 613
circumstances by which may be determined . . . 614
by whom notice should and may be given 615
joint lessees or lessors 616
partners 617
one giving notice as agent of co-tenant 618
agent must have authority at time of giving notice 619
agency must extend to the duty undertaken . . 620
when authority inferred 621
by corporation 622
by receiver 623
when should be by tenant 624

LANDLORD AND TENANT — *Continued.* SECTION
when by landlord 625
to whom given 626
joint tenants, tenants in common, partners . . . 627
to corporation 628
form and sufficiency 629
address of written notice 630
what to contain 631
statement of cause 632
time to be mentioned in general terms 633
tenant from week to week 634
must not demand possession forthwith . . . 635
undue strictness not required 636
description 637
substantial accuracy sufficient 638–640
service 640
may be waived 641
voluntary surrender by tenant 642
by parol, and acceptance by landlord 643
offering to let, not waiver of notice by landlord . 644
parol surrender must go into immediate effect . . 645
verbal license to surrender tenancy from year to year 646
defects in notice may be waived 647
waiver of rights under notice 648
will not be presumed from acceptance of rent by an unauthorized person 649
mere permission to remain after notice, no waiver . 650

LAWS,
of which judicial notice is taken 1404
not judicially noticed 1405, 1408

LEASE,
assignment of, properly recordable 116
verbal, termination of by notice to quit,
See LANDLORD AND TENANT.

LESSEE,
possession by, changed to possession as owner, effect of as notice 303

LETTER CARRIERS,
notice of dishonor of commercial paper served by . . 869–874
See BILLS AND NOTES.

LETTER OF CREDIT,
notice of acceptance of, and of failure of principal,
See GUARANTOR.

LIABILITIES, SECTION
notice by which certain, created . . . . Ch. III, §§ 378–480
See ACCEPTANCE.
" GUARANTY.
" ASSIGNMENT.
" CARRIERS.
" STOPPAGE IN TRANSITU.
for tort fixed by notice 480*g*–480*k*
notice by which certain, extinguished or modified Ch. IV, §§ 481-650
See DISSOLUTION OF PARTNERSHIP.
" CARRIERS.
" ARRIVAL.
" LANDLORD AND TENANT.

LIEN,
for purchase money of chattels, undisclosed 71
notice of, from recitals in title papers,
See TITLE PAPERS.

LIS PENDENS,
notice to purchasers by 337–377
Lord Bacon's rule 337
public policy 338
doctrine of constructive notice applied 339
views of Judge Story 340
of Chancellor Kent 341
rule of equity jurisprudence 342
various actions in which the doctrine has been applied 342*a*
applied to action of ejectment 343
confined to proceedings in courts of general jurisdiction 343
the doctrine indispensable 344
applied in partition suits 342*a*, 343
views of Lord Hardwicke 345
effect of revivor 346
payment of consideration no protection to purchasers . 347
commencement of suit 348
service of process 349
harshness of the rule 350
property to be identified 351
alimony 352
creditor's bill 353
jurisdiction necessary 354
holder of legal title must be impleaded 355
equitable interests between co-defendants unaffected 356
suit must be continuously prosecuted 357
effect of dismissal 358

LIS PENDENS — *Continued.* SECTION
diligence in prosecution 359
not affected by death of party 359
rule not extended to affect others than subsequent purchasers 360
nor to affect purchasers from different source of title 360
prior mortgagee unaffected 361
foreclosure of prior mortgage 362
antecedent equity 363, 364
owner of, may acquire legal title, *pendente lite* . . 365
contingent right may be rendered absolute, *pendente lite* 366
waiver of rights by plaintiff, after judgment or decree . 367
purchase must be from party to the suit 368
generally confined to purchaser of real estate 369
purchaser of securities affected 370, 371
does not affect purchasers of negotiable instruments . 372
peculiar kind of property 373
statutory provisions 374
purchaser not affected personally 375
statute of limitations does not run during suit 376
purchaser at execution sale 377

LOST BILL,
negotiable, notice of to purchasers, not sufficient by advertisement 81

MACHINERY,
dangerous, liability of owner for, fixed by notice. . . . 480*k*

MAIL,
notice of dissolution of partnership by 500, 501
notice of dishonor of commercial paper by 807, 815, 816, 869–929
See BILLS AND NOTES.

MAKER,
of note, when may give notice of its dishonor. 713

MANNER AND MODE,
of giving notice of dishonor of negotiable instrument . 828–929
See BILLS AND NOTES.

MARRIAGE SETTLEMENT,
purchaser of real estate with notice of 51
registry of, required by English statute 106

MARRIED WOMAN,
when party to bill or note may give notice of dishonor . . 728

MECHANIC'S LIEN,
notice of 1155

MESSENGER, SECTION
notice of dishonor of commercial paper sent by, sufficient if in time 889
MINOR,
should be notified of dishonor of bill or note to which he is a party 773
may give notice of dishonor of bill or note held by him . 727
service of summons in suits against 1316
MISCELLANEOUS PROCEEDINGS,
of which notice given by publication 1122–1134
general remarks 1122
contract for public improvements 1123
special assessments 1124
intention to order improvements 1125
opening street 1126
eminent domain 1127
sales by guardians and curators 1128
executors' sales 1129
sold for paying debts of decedent 1130
executor's notice, how addressed 1131
meeting to divide township 1132
mortgagees' sales 1133
matters elsewhere treated 1134
MORTGAGE,
released by one other than mortgagee, should put purchaser from mortgagor on inquiry 20
of chattels, how affected by registry laws 77
equitable, under British registry acts 105–109
registered, claim under, as against unregistered will . . 108
agreement to execute, a proper subject for registration . . 111
assignment of, is recordable 117
conditions of, should be expressed to operate as notice when registered 179, 272
when with sufficient certainty 181, 182
securing future advances, registration of, as notice . . 182
secret, record of, will not operate as notice 191
two simultaneously executed and delivered, effect of prior registry of one 197
purchaser with knowledge of unrecorded 253
assignee of, regarded as purchaser 262
description in, of debt secured by, and of property incumbered 272
See REGISTRATION OF INSTRUMENTS.
notice from recitals in,
See TITLE PAPERS.

MORTGAGEE, SECTION
not prejudiced by officer's failure to index record of mortgage 171
sales by 1133

MOTIONS,
And other proceedings in court, notice of 1182–1207
by entry in book 1183
when should be given 1184
presence of counsel will not waive 1185
parties charged with 1186
motion in the nature of summary judicial proceeding . 1187
to set aside sheriff's sale 1188
filed during term of court 1189
examples under different statutes 1190
motion to dismiss appeal 1191
sufficiency of 1192
substantial accuracy 1193
against constable 1194
designation of court 1195
date of filing 1196
circumstances affecting sufficiency 1197
should generally be in writing 1198
service 1199–1203
upon party or his attorney — generally from one attorney to another 1199
upon the party 1200
time 1201
motion for new trial 1202
waiver by appearance 1203
reference 1204
reinstatement of case 1205
rule to show cause 1206
of examination of accounts 1207

MUNICIPAL CORPORATIONS,
liability of, for torts, fixed by notice 480*g*

MUNICIPAL ORDINANCES,
extent to which judicially noticed 1409

NAME,
error in, will not affect notice of dishonor from proper party 718

NEGLIGENCE,
for purchaser put upon inquiry, not to inquire 17, 88
by which purchasers of negotiable instruments affected with notice 82, 87
and bad faith of purchaser, questions of fact 83

NEGLIGENCE — *Continued.* SECTION
notice given by carrier will not exempt from consequences of 558–561
in failing to inquire amounts to voluntary ignorance . . 279

NEGOTIABLE INSTRUMENT,
purchaser of, before maturity, only affected with actual notice of infirmities 36*a*, 40–42*a*, 80–94
lost bill 81
holder of, only affected when grossly negligent in purchasing 82
bad faith requisite to defeat rights of purchaser before maturity 83
purchaser without notice protected 84
knowledge a question of fact. 85
facts which excite inquiry held inadmissible against purchasers before maturity 86
circumstances which put purchaser on his guard . . . 87
bad faith an inference of fact . . . . . 88, note 1
inquiry excited by inspection of paper 90
when "general notice" sufficient 91
suspicious circumstances 92
payment before and after notice 93
patent defects affecting purchasers 94
unaffected by *lis pendens* 372
without indorsement notice of assignment held necessary 442
Notice of dishonor of 702–1028
by whom given 702–728
to whom given 729–775
time of giving 776–827
manner and mode of giving 828–929
waiver and excuse 930–1028
See BILLS AND NOTES.

NEWSPAPER,
what is 1066
containing advertisement of dissolution, reading, will not charge old customer with notice 504–507
advertisement in, will not be sufficient notice to limit carrier's liability 546
publication of original process in 1065–1067
effect of changing name of, upon published notice of judicial sale 1090

NON-JUDICIAL INVOLUNTARY SALES,
Notice of, by publication 1105–1121
strict compliance with statute required 1105
tax sales 1106
publication an official act 1107

NON-JUDICIAL INVOLUNTARY SALES — *Continued.* SECTION
when state printers designated 1108
should state the amount due 1109
should give the name of tax debtors 1110
time fixed by statute to be closely followed 1111
sale held void for failure of notice, after fifty years . 1112
construction of statute as to time of publication . . 1113
three successive publications for three months . . 1114
during three successive weeks 1115
should commence after tax becomes due 1116
form and sufficiency 1117
when form prescribed by statute 1118
proof of publication 1119
statutory mode of, exclusive 1120
required certificate must be contained in statement . 1121

NON-RESIDENTS,
service of summons upon 1358, 1359

NOTES,
See BILLS AND NOTES.
See NEGOTIABLE INSTRUMENTS.

NOTICE,
Different kinds of 1–47
actual notice 1–36
constructive notice 37–47
to purchasers 48–377
of different kinds of property or securities 48–94
registration of instruments 95–272
notice by possession 273–306
notice from title papers 307–336
lis pendens 337–377
by which certain liabilities are created 378–480
of acceptance of proposals 378–385
of guaranty 386–427
of assignment 428–450
to carriers and other bailees 451–480
by which liability is extinguished or modified 481–650
dissolution of partnership 481–530
limiting the liability of common carriers and other bailees 531–577
landlord and tenant 578–650
between principal and agent 651–701
of agency 651–671
to an agent 672–695
by an agent 696–701
of dishonor of commercial paper 702–1028
See DISHONOR.

NUISANCE, SECTION
liability for, fixed by notice 480*g*, 480*k*
notice to abate 480*h*

OCCUPANCY,
by tenant, notice of landlord's title 284, 285
by church society, is notice to purchasers 289
See POSSESSION.

OFFER,
continuing and limited, notice of acceptance of 378
by auctioneer, what amounts to acceptance of 381

OFFICER,
before whom acknowledgment of deeds may be made . 130–136
See ACKNOWLEDGMENT.
by whom instrument may be recorded 144–146
by officer *de facto* 145, 146
of corporation, notice to is notice to corporation 683*b*
by whom publication of notice to be ordered . . . 1052–1054
when party to action, by whom process served 1298

OFFICERS,
election and appointment of, judicially noticed 1412
signature of, judicially noticed 1413

OMISSIONS,
from notice of dishonor, immaterial, will not affect . . 836–840
immaterial, in published notice of judicial sale 1089
in original process 1155

ORDER OF PUBLICATION,
See PROCESS.
See PUBLICATION.

ORIGINAL PROCESS,
See PROCESS.

PAPERS,
notice to produce to be offered in evidence 1257–1292
See BOOKS AND PAPERS.
in the hands of attorney, he may be required to testify to their existence, though intrusted to him in confidence . 1272

PAROL,
contract to convey, purchaser affected with notice of . . 52

PARTIES,
affected with notice by pendency of suit 355, 356
to notes or bills may give notice of dishonor 703–713

PARTITION,
lis pendens, in action to set aside decree of 342*a*, 343
original process in suits for, property should be described . 1059

PARTNER, SECTION
retiring, must give notice of assignment of insurance policy 448
dormant, notice of dissolution unnecessary 492
who is, within meaning of the rule 493–495
not entitled to notice of dishonor of bill drawn by co-partner 733
notice to, of dishonor of partnership paper 751, 752
how served to bind both 878, 1314, 1315
See BILLS AND NOTES.

PARTNERSHIP,
effect of knowledge of, by one purchasing from one of the partners 26
Notice of dissolution of 481–530
See DISSOLUTION OF PARTNERSHIP.

PATENT,
to real estate, notice from recitals in 311, 312

PAYMENT,
notice prior to, will bind purchasers 60, 93
effect of, when made on day of dishonor of note or bill . 780
refusal of, at maturity, will justify notice of dishonor . . 783
failure of and qualified refusal 784

PENNY POST,
as a means of serving notice of dishonor of bills and notes 772
See BILLS AND NOTES.

PERSONAL PROPERTY,
how purchasers of, may be notified of adverse interests,
See CHATTELS.
notice of title to, from recitals in title papers,
See TITLE PAPERS.
notice of title to, by possession,
See POSSESSION.

PLEADING,
division of subject 1386
when necessary to aver notice 1387
action on guaranty 1388
when notice unnecessary 1389
facts within defendant's knowledge 1390
when knowledge lies between the parties 1391
when want of notice to be averred 1392
manner of alleging notice 1393
must aver that it was given to proper party . . 1394, 1396
when substituted by statute, should show strict compliance 1395

PLEADING — *Continued.* SECTION
should appear to be given in due time 1396
waiver and excuse to be alleged 1396, 1397
facts pleaded according to their legal effect 1398
manner of averring want of notice 1399
admissions in plea or answer 1400
consequences of defective pleading 1401
practice under the code 1402

PLEDGE,
property held in, will be subject to terms of contract between parties 73
not subject to secret trusts of which pledgee had no notice 68

POLICY OF INSURANCE,
assignment of, notice requisite 444–447

POSSESSION,
Notice by 273–306
general doctrine 273
modified by registry laws 274
evidence of actual notice 275
sufficient to put purchaser on inquiry 276, 277
effect of knowledge of possession, where *actual* notice not required 278
voluntary ignorance 279
character of occupancy 280
by tenant under lease 281
of interest claimed by occupant 282
of interest of occupant's creditors 283
tenant's occupancy, notice of landlord's title . 284–286, note
no evidence of title in stranger 287
possession must be actual, notorious and continuous 286, note, 288
occupancy by church society 289
should be exclusive 290
unequivocal 291
when doubtful in extent 292, 293
possession and claim of right should be contemporaneous 294–302
instance where possession and claim not required to be concurrent 295
effect of abandonment 296
when possession referred to record title 297, 298
claim inconsistent with record 299
of reservation of easement 300

POSSESSION — *Continued.* SECTION
exception to rule requiring claim and record to be consistent 301
possession to begin with unrecorded title 302–304
lessee's occupancy, changed to possession as owner . . 303
creditors affected with notice by 305
chattels 306
held insufficient to affect purchasers 14
held sufficient 16, 78
regarded as constructive 44
of deeds, that the one in possession has an interest in the land 46, 56
of chattels, not conclusive evidence of title 69
as notice to purchasers generally 78
of goods by consignee, ends transit 466

POSTING,
notices by carriers, limiting their liability as insurers, insufficient 538, 539
notices of judicial sales, in public places 1104
as a substitute for personal service,
See SERVICE.

POSTOFFICE,
to which notice of dishonor of bill or note should be directed 883–909
See BILLS AND NOTES.

PRACTICE AND PLEADING 1135–1402
Original process 1135–1161
Notice of trial 1162–1181
Notice of motions and other proceedings 1182–1207
Notice of appeals 1208–1220
Notice of taking depositions 1221–1256
Notice to produce books and papers 1257–1292
Service 1293–1360
Return 1361–1385
Pleading 1386–1402

PRESUMPTION,
of knowledge conclusive from record 97

PRESUMPTIVE NOTICE,
distinction between and constructive notice 40
when dependent upon presumption of fact — actual,
See ACTUAL NOTICE.
when dependent upon presumption of law — constructive,
See CONSTRUCTIVE NOTICE.

PRICE,
inadequacy of, sufficient to put purchaser on inquiry . . 23, 24

PRINCIPAL AND AGENT, SECTION
See AGENCY.
See AGENT.
PRINCIPAL AND GUARANTOR,
See GUARANTOR.
PRIORITY,
between, deeds as affected by registry 196–202, 256
simultaneous mortgages 197
as between original parties, priority subject to agreement 198
registration will not divest accrued rights 199
innocent purchaser not charged with notice of, except by the record 200
order of filing governs 201
deeds recorded in reasonable time after delivery,—sufficient 202
PROCESS,
Original, publication of 1029–1085
general character of service by publication 1029
must conform to statute 1030, 1148
suits in which generally employed 1031
affidavit or declaration 1032
must aver jurisdictional facts 1033
should state that property of defendant within state . 1034
must state a cause of action 1035
ground of attachment 1036
attachment of property 1037
requisites of affidavit in New York 1038
example of sufficient affidavit in California 1039
averment of "due diligence" held sufficient 1040
difference in statutes 1041
conclusion of law not to be stated 1042
expression of opinion not sufficient 1043
information and belief 1044
sufficient statement of absence from state 1045
affidavit attached to other papers 1046
when sufficiency of, presumed 1047
not impeachable in collateral proceeding 1048
averments in pleading, same as in affidavit 1049
amendments not allowed after publication 1050
order of publication and notice 1051
who to make order 1052
must be by officer designated by law 1053
effect of change of order without authority . . . 1054
contents of order 1055
must contain sufficient recitals to inform defendant . 1056

PROCESS — *Continued.* SECTION
averment of attachment, in notice 1057
nature and amount of plaintiff's demand 1058
foreclosure and partition — description 1059
names of defendants 1060
unnecessary to mention statute 1061
order must be properly signed 1062
should state the return day 1063
publication 1064
in newspaper 1065
what is 1066
must be published in the one designated 1067
substitute for publication in 1068
must be for full time 1069
computation of time 1070
three calendar months 1071
three weeks successively 1072
last insertion four weeks prior to time 1073
six weeks' publication 1074
when period cannot be shortened 1075
days, weeks or months 1076
certain time or certain number of times . . . 1077
ten publications in ten weeks 1078
two weeks in daily paper 1079
proof of publication 1080
must be to satisfaction of court 1081
affidavit not conclusive 1082
divorce and alimony 1083
judgment binds property only 1084
not subject to collateral attack 1085
Original, by which judicial proceedings instituted . 1135–1161
general nature of modern summons 1135
importance of due service 1136
when personal notice required 1137
rule applies to all judicial or quasi-judicial proceedings . 1138
assessment of damages to property 1139
decree in chancery, summary proceedings 1140
judgment against sureties 1141
divorce and alimony 1142
in actions before justices of the peace 1143
actions *in rem* 1144
annulling certificate of purchase 1145
knowledge will not answer as a substitute for notice . 1146
must be written or printed 1147
what notice or summons should contain . . . 1148–1157
should state time and place 1149

PROCESS — *Continued.* SECTION
when but one cause of action stated 1150
scire facias — citation and copy of petition required 1151
should contain names of defendants 1152
omission of, held immaterial 1153
mere irregularity in stating, will not defeat . . . 1154
immaterial variations and omissions 1155
requirements of different states as to certainty . . 1156
when the purpose of the action to be stated . . . 1157
infant defendants, strictness required in the interest of 1158
when returnable 1159
substantial and technical defects, how jurisdiction affected by 1160
jurisdiction defined 1161
service of,
See SERVICE.

PROMISE,
subsequent to dishonor of bill or note, considered as waiver of notice 957-975
conditions of waiver 957
made without knowledge 958
express or implied waiver 959
implied 960
promise to "see it paid" 961
recitals in contract acknowledging bill 962
must be unequivocal 963
admissions to strangers not sufficient 964
when regarded as evidence of notice 966
either waiver or admission of due notice 969
burthen of proof 970
prima facie evidence of diligence 971
evidence of knowledge of *laches* 972
onus cast upon the holder 973
principles governing the question 974

PROOF,
of publication 1080-1082
must be satisfactory to court 1081
affidavit not conclusive 1082

PROPOSALS,
notice of acceptance of,
See ACCEPTANCE.

PUBLICATION,
of notice of dissolution, when, and when not, effectual 504-519
not available against those who have had prior dealings . 504

PUBLICATION — *Continued.* SECTION
insufficient, though printed near advertisement of old customer 505
reading paper containing announcement, not conclusive 506
inference drawn from publication 507
what are prior dealings 508
discounting notes 509
honoring successive drafts 510
renewal of accommodation paper 511
single purchase may be sufficient 512
constructive notice to those who have had no prior dealings 513
no fixed rule as to time of publication 514
should be in newspaper 515
where papers should be published 516
selection of paper 517
manner of, open to inquiry 518
English and American doctrine — publication not indispensable 519
of notice, will not limit carrier's liability 533
of notices 1049–1134
See PROCESS.
" JUDICIAL SALES.
" NON-JUDICIAL INVOLUNTARY SALES.
" MISCELLANEOUS PROCEEDINGS.

PUBLIC POLICY,
the foundation of doctrine of *lis pendens* 338

PURCHASERS,
Notice to 48–377
when actual 12
to use diligence when put upon inquiry 17
of equitable interest, with knowledge of legal title in another 18
with notice of vendor's lien 19
from mortgagor 20
inadequacy of price will put upon inquiry 23, 24
relationship between the parties, ground for inference of notice 25
affected with notice that property belongs to partnership . 26
put upon inquiry by information 27
may disregard vague statements 29
protected after fruitless inquiry 34
pendente lite, bound by notice constructively 45
See LIS PENDENS.
constructively notified by recitals in title papers 46

PURCHASERS — *Continued.* SECTION
Difference in effect of notice to, of different kinds of property or securities 48–94
division of subject 48
of real property, by what kind of notice affected . . . 49–66
See REAL ESTATE.
without, from purchasers with, notice 61
with, from purchaser without, notice 62
when original *mala fide* purchaser not protected . . . 63
with notice of unregistered conveyance 64
See UNREGISTERED INSTRUMENTS.
of chattels, notice to 67–78
See CHATTELS.
of negotiable securities, how affected with notice . . . 80–94
time when notice must be given to affect 92*a*
See NEGOTIABLE INSTRUMENTS.
of real estate, affected with notice by registry of prior deed 97
See REGISTRATION OF INSTRUMENTS.
to take advantage of failure to record deed, must be for value 226
put upon inquiry by knowledge of possession by one claiming adversely to grantor,
See POSSESSION.
notified by recitals in title papers,
See TITLE PAPERS.
of bills of lading, *bona fide*, entitled to protection . . 472, 473
at judicial sale, with notice 1087

QUIT,
notice to, when given by agent 698–701
written or verbal 699
effect of subsequent ratification 700
unauthorized when given, valid only from ratification . 701
reciprocal right between landlord and tenant,
See LANDLORD AND TENANT.

QUITCLAIM DEED,
registration of, is constructive notice only of what record shows 204

RAILROADS,
when their liability as common carriers may be fixed by notice 451–480
See CARRIERS AND OTHER BAILEES.
when they may be affected with notice of vendor's lien on goods 457–480
See STOPPAGE IN TRANSITU.

RAILROADS — *Continued.* SECTION
notice limiting the liability of, as insurers of goods carried 531–560
See CARRIERS.
termination of responsibility of, by notice to consignee . 562–577
See ARRIVAL.

RATIFICATION,
by principal, of acts of agent 667
with notice, binds principal 668
effect of silent acquiescence 669
of notice to agent,— when validity depends upon . . . 691
of act of agent in giving notice for principal 700
valid only from time of principal's approval 701
of acts after authority revoked 671*a*

REAL ESTATE,
purchasers of, affected with notice, actual or constructive, of adverse claims 49–66
when subsequent purchase, in bad faith 50
purchase with notice of prior marriage settlement . . 51
parol contract to convey 52
vendor's lien — vendee required to perform in lieu of his grantor 53
an adopted son's equity arising out of contract made at time of adoption 54
prior and subsequent contracts to convey 55
possession of title deeds as notice of possessor's rights . 56
purchaser, with knowledge of trust, becomes trustee . 57
mortgagee, with knowledge of trusts 58
notice to trustee, to affect *cestui que trust* 59
notice prior to payment, sufficient 60
purchaser without, from purchaser with, notice . . . 61
purchaser with, from purchaser without, notice . . . 62
repurchase by original *mala fide* purchaser 63
unregistered conveyances of 64
how subsequent purchasers may be affected with notice of 65, 66
See UNREGISTERED INSTRUMENTS.
notice of prior conveyances from recitals in deeds,
See TITLE PAPERS.

RECITALS,
in deeds, effect of as notice to purchasers,
See TITLE PAPERS.
what sufficient in published notice of suit 1055–1059
See PROCESS.

RECORD, SECTION
of conveyances by grantor, prior to his acquisition of title . 214
will not affect subsequent purchaser, who takes without further notice 215
contrary doctrine examined 216
REFERENCE,
notice of 1204
REGISTRATION OF INSTRUMENTS,
notice by 95–272
the general scope and operation of the statute . . . 95–112
provided for by statute 95
object of American registry laws to protect *bona fide* purchasers 96
registration notice to subsequent purchasers 97
must be properly of record 98
prerequisites to valid registry 99
subscribing witnesses 100
when instrument to be filed 101
consequence of delay in filing 102
exceptional legislation 103
English and Irish registry acts 104
equitable mortgage 105
registry of marriage settlement 106
Irish act 107
registered mortgage and unregistered will 108
registered legal mortgage and unregistered equitable mortgage 109
memorandum of "further change" 110
agreement to mortgage 111
acknowledgment of execution 112
recordable instruments 113–123
what instruments should be recorded 113
reservation of right of way 114
deed of assignment 115
assignment of lease 116
assignment of mortgage 117
consideration 118
instruments not recordable 119
assignment for benefit of creditors 120
certificate of emancipation 121
executory contracts 122, 123
statutory prerequisites to recording 124–146
requirements of the statute must be complied with . . 124
necessity for acknowledgment 125–136
See ACKNOWLEDGMENT.

REGISTRATION OF INSTRUMENTS — *Continued.* SECTION
attesting witnesses 137
when two required 138
witnessed by one, insufficient 139
defective execution held immaterial 140
record inoperative without delivery 141
delivery after recording 142
effect of 143
delivery to the recorder for the grantee 143*a*
must be recorded by proper officer 144
by officer *de facto* 145, 146
errors in the record 147–173
effect of 147
in description 148
effect of filing, and subsequent error in recording . . 149
to whom is the officer responsible for errors 150
different construction of the statute 151
the notice unaffected by errors in recording 152
partial omission 153
entire omission 154
early American authorities 155, 156
destruction of the records does not affect the notice . 157
effect of error in amount secured by mortgage . . 158
error in description of property 159
fraudulent concealment by officer 160
immaterial errors 161
principle governing errors in the record 162
errors in the original, and errors of the recorder, distinguished 162
failure to record in proper time 168
the index 164–173
See INDEX.
errors by the party filing the instrument 174–195
misleading errors in original 174
insufficient description 175
errors in numbering 176
description of chattels 177
description in mortgage, of debt due 178, 272, note 3
conditions insufficiently expressed 179
what degree of certainty held sufficient . 180, 181
mortgage securing future advances 182
description which may be rendered certain by inquiry, sufficient 183
errors by which purchasers not misled, held immaterial 184, 185
instruments should be filed in their true character . 186

REGISTRATION OF INSTRUMENTS — *Continued.* SECTION
deed with defeasance should be filed as mortgage . 187
should be recorded as mortgage, and not as deed of conveyance 188
same rule applies where defeasance is by parol . 189
sheriff's deed, recorded as mortgage, will not operate as constructive notice 190
record of secret mortgage 191
must be filed in proper county 192
effect of filing in wrong county 193
deposit of chattel mortgage in wrong town . . . 194
change of county subsequent to filing will not affect registry 195
conflicting titles affected by priority of registration 196–230
order of priority between deeds as affected by registration 196
See PRIORITY.
reasonable time for filing instrument 202
subsequent purchasers alone affected by registration 203
record of quitclaim deed 204
the instrument must be in the chain of title . . 205–213
See CHAIN OF TITLE.
instruments filed for record prior to acquisition of title 214–216
See RECORD.
purchaser from heirs without notice of unrecorded deed from ancestor 217–222
See HEIRS.
record of conveyances between strangers, void as notice 223
of instruments affecting chattels, follows property . 224
time given for registration of deeds 225
advantage taken of failure to register only by purchaser for value 226
record of voluntary deed effective 226
assignee for benefit of creditors 227
creditor purchasing at execution sale 228
notified by registry prior to sale 229
interest of mortgagee not affected by bidding at execution sale 230
other notice considered in connection with registration 231–272
actual notice of unregistered deeds 231–253
the extent to which affects subsequent purchaser . 231*a*
See UNREGISTERED INSTRUMENTS.

REGISTRATION OF INSTRUMENTS — *Continued.* SECTION
unregistered deeds and judgments,
See JUDGMENTS.
instruments affecting an equitable interest . . . 254
effect of withdrawing from files before recording . 255

RELATIONSHIP,
between parties to contract, sufficient to put purchaser on inquiry 25

RESIDENCE,
respective places of, of parties to bills and notes, as it affects the manner of giving notice of dishonor 843–929
See BILLS AND NOTES.
in one place, and place of business in another 852
what is place of 854
need not be domicile 855
having notice of dishonor at 856
notice may be served at, or at place of business 863

RETURN,
the, by which proof of service is made 1361–1385
nature and purpose of, form and sufficiency 1362
when name of officer not used 1363
served without state 1364
should show compliance with statute 1365
to the proper term 1366
contents of 1367, 1368
immaterial errors 1369
defects cured by recital in judgment 1370
judgment by default on insufficient, void 1371, 1372
contradicted by the record 1373
examples of defective 1374
what deemed sufficient 1375
of service on corporation 1376
inference from general language of 1377
cannot be contradicted 1378
exception to above 1379
presumptions in favor of return 1380
may be amended 1381
aided by presumption 1382
aided by parol evidence 1383
aided by contents of bill 1384
conflicting views as to impeaching 1385

RIGHT OF WAY,
agreement reserving should be recorded. 114

SALES, SECTION
conditional, of personal property 72–75
See CONDITIONAL SALES.
judicial,
See JUDICIAL SALES.
non-judicial involuntary,
See NON-JUDICIAL INVOLUNTARY SALES.
by guardians and curators, notice by publication 1128
by executors or administrators 1129, 1130
SCIENTIFIC FACTS,
of which courts take judicial notice 1416
SEALS,
official, judicially noticed 1413
SECRET INSTRUCTIONS,
to broker will not affect purchaser in good faith 70
SERVANT,
notice to, dissolution of partnership 502
occupying premises of master, not entitled to notice to quit 595
SERVICE,
of different kinds of notices 1293–1360
division of subject 1294
by whom served 1295–1298
not by party in interest 1296
by unofficial person 1297
when the officer whose duty to serve is a party . . 1298
notice of motions, etc. 1299
to take depositions 1243, 1300
upon whom served — depositions 1301
original process, on agent 1302
upon foreign corporations 1303
statute for benefit of residents 1304
reasonableness of rule 1305
federal judiciary act in relation to 1306
United States circuit courts have limited jurisdiction 1307
how jurisdiction obtained in federal courts . . 1308
how corporations served 1309
upon ticket agent 1310
where statute, directory and permissive . . . 1311
on municipal corporations 1312
on city clerk, insufficient 1313
upon partners 1314
principal defendant 1315
upon minors 1316
upon convicts 1317

SERVICE — *Continued.* SECTION
upon party by wrong name 1318
variance between name in process and other papers 1319
several defendants in different counties 1320
upon attorney 1321
in suit before justice of peace 1322
should not be after his connection with case has ceased 1323
"due" notice 1324
application for injunction 1325
construction of "reasonable notice" 1326
time fixed by statute 1327
admissions 1328
notice of motion for new trial 1329
time computed from date of service 1330
how computed 1331
summons must be for full time 1332
manner and mode of 1334
personal 1335
leaving at place of abode, not sufficient 1336
personal upon attorney 1337
strict requirements as to summons 1338
different modes of personal service 1339
by reading original, or delivering writing . . . 1340
written, must be by delivery 1341
rule deduced from foregoing. 1342
at place of abode 1343, 1344, 1347–1350
leaving at residence or place of business, good only when prescribed by statute 1345
in what cases officer may elect 1346
leaving at place of residence 1348
with member of family to which party belongs . 1348
must be at present place of abode 1349
necessity for strict construction 1350
actions against property by posting, etc. 1351
personal in foreign state 1352
proof of 1353
effect of acknowledgment or waiver 1354
by mail 1355
chancery proceedings in United States courts . . . 1356
on board foreign vessel 1357
non-resident, temporarily within jurisdiction . . . 1358
Sunday or legal holiday 1359
reference to other chapters 1360
of notice to quit 640
may be waived 641

SERVICE — *Continued.* SECTION
of notice of dishonor of commercial paper 843–929
See BILLS AND NOTES.
of notice of trial 1170–1172
of notice of appeal, upon attorney 1209
personal not always required 1217
of notice to take depositions 1243–1248, 1251
of notice to produce books and papers at the trial . 1287–1292
personal, not indispensable 1292

SPECIAL ASSESSMENTS,
notice of, by publication 1124

STATE,
name of, should be in address of notice by mail 927

STATUTES,
public, domestic, of which courts take judicial notice . . 1404
foreign, not judicially noticed 1405
local and special, not judicially noticed 1408

STOCKS,
notice of infirmities of title to, from recital in will . . . 333

STOPPAGE IN TRANSITU,
by notice to carrier 457–480
object of, to affect consignee through carrier 457
inquiry confined to affect upon carriers 458
time of giving notice 459
during *transit* — when transit begins and ends . . . 460
before arrival and demand of consignee 461
arrival and demand to be concurrent facts 462
effect of notice, to give vendor right of possession . . 463
end of *transitus* by delivery 464
fact of delivery determined by intent 465
effect of possession by consignee 466
views of Chancellor Kent 468
storage in government warehouse 469
notice to employee of carrier 470
responsibility of carrier 471
effect of assigning bill of lading 472
must be to *bona fide* purchaser 473
end of transit by interception 474
vendor's right, takes precedence of judgment lien . . 475
by whom notice may be given 476
by factor 477
by party to contract respecting goods 478
by owner's guarantor 479
by agent 480

STRANGERS, SECTION
to the title, record of conveyances between, will not affect purchasers 223
STREETS,
notice of opening 1126
notice of dangerous condition of 480*g*
SUBSEQUENT PURCHASER,
with actual notice 231*a*
See PURCHASER.
SUIT,
when commenced so as to operate as *lis pendens* . . . 348, 349
must be continuously prosecuted 357–359
notice of commencement of,
See PROCESS.
SUMMONS,
See PROCESS.
SUNDAY,
or legal holiday, service of notice on 1359
party to bill or note not bound, notice given on . . . 818–820
SURETIES,
entitled to notice of proceedings to obtain judgment against them 1141
SURRENDER,
of property held under tenancy from year to year . . . 642
by parol and acceptance, effect of 643
TAX SALES,
notice of by publication 1106–1107
See NON-JUDICIAL INVOLUNTARY SALES.
TENANCY,
nature of, requiring notice to quit . . . . . .
which does not require notice to quit . . . . . .
from year to year, proof of . . . . . .
by the quarter . . . . . .
from month to month 611
different kinds of, uncertain 613
from week to week 614
See LANDLORD AND TENANT.
TENANT,
notice to quit, to and by 578–650
See LANDLORD AND TENANT.
TERM,
of court to be designated in notice of trial 1168, 1169
of which judicial notice is taken 1414
to which process returnable,
See PROCESS.
See RETURN.

TIME, SECTION
when notice must be acquired to affect purchasers . . . 92*a*
of recording instruments, to be operative as notice . . 196–202
given for registration of deeds 202
within which notice of unrecorded deed given, to affect
purchaser of real estate 263
to attaching creditor 264
when too late 265
after purchase at execution sale 266
in time if before legal title conveyed 267
not necessarily within limits prescribed by statute . . 268
after death of grantor, too late as against creditors . . 269
of giving notice of acceptance of guaranty 406
of giving notice to quit 607
regulated by statute 608
expiration of, must be at commencement of new term . 609
tenancy by the quarter 610
from month to month 611
principal and accessorial subject of demise 612
of acquiring knowledge by agent, to affect principal . 687–690
For giving notice,
of dishonor of commercial paper 776–827
See BILLS AND NOTES.
reasonable time required 794
no exception to rule requiring 827
of publication of original process 1069–1079
of judicial sales 1100–1102
of non-judicial sales 1111–1116
and place to be stated in original process 1149
Of notice of trial 1178–1181
Of notice of motions and other proceedings 1201
Of notice of appeal 1215, 1216
of taking depositions, should be mentioned in notice . . 1230
Of notice to take depositions 1233–1242
See DEPOSITIONS.
Of notice to produce books and papers 1286–1288
Of service,
See SERVICE.

TITLE PAPERS,
Notice from recitals in 307–336
general statement of doctrine 307
equivalent to actual notice 15, 308
treated as constructive notice 46, 309
modification of the rule 310
recitals in original patent 311, 312

TITLE PAPERS — *Continued.* SECTION
sufficient if recitals lead to knowledge 313
must be in same transaction 314
should be in same chain of title 315
recitals reasonably certain 316, 317
example of general recital 318
uncertainty of description 319
striking peculiarities of recitals 320
in will 321
limitations upon effect of recitals 322
recital of a trust 323
may be from recitals in variety of instruments — will 324
instruments collateral to the chain of title 324
in mortgages 325
in books of record 326
in conveyance by statute 327
in deed — facts which may be thus brought home to purchaser 328
in contract to convey 329
in deed — of vendor's lien 330
who affected 331
different kinds of property 332
stocks — transferred by executor 333
personal property 334
inquiry excited by, should extend to examination of papers 335
deed of real estate containing bill of chattels . . . 336

TORTS,
notice by which liability for may be fixed 480*g*–480*k*
notice of, to agents and servants 695

TOWNS,
incorporation of judicially noticed 1411

TRANSITU,
stoppage in 457–480
See STOPPAGE IN TRANSITU.

TREATIES,
public, judicial notice taken of 1406

TRIAL,
Notice of 1162–1181
required by statute 1162
example from New York Code 1163
English rule 1164
should not be vague or misleading 1165
should specify the suit 1166
may be noticed for trial by either party 1167

TRIAL — *Continued.* SECTION
sufficiently explicit as to time 1168
party notified may safely rely on time designated . . 1169
served before issue joined 1170
does not depend upon discretion of court 1171
service upon party or attorney 1172
effect of continuance 1173
effect of amendment after notice 1174
waived 1175
judgment attacked for want of 1176
must be for substantial defects 1177
statement of wrong day of commencement of term, not fatal 1178
failure to place on calendar — judgment set aside . 1179
Wisconsin Code 1180
time under English rule 1181

TROVER,
actions of, when notice to produce books and papers unnecessary 1263

TRUSTEE,
insolvency of, should put purchaser from, on inquiry . . 22
purchaser from, decreed to perform 57–59
when member of partnership, notice to, will affect partners 59

TRUSTS,
purchaser with implied notice of 21, 22
sufficient to affect his conscience, takes place of original trustee 57–59
notice of, from recitals in title papers,
See TITLE PAPERS.

UNREGISTERED INSTRUMENTS,
can only be taken advantage of by purchaser for value 226, 227
good against subsequent purchaser at execution sale . 228, 229
actual notice of, will bind subsequent purchaser 231
purchaser at execution sale protected against, by good faith of execution creditor 232
equitable interference in favor of holder of 233
recorded, after adverse levy, not preferred to purchaser at execution sale 234
good against creditors with notice 235
notice of, to be effectual, must be subsequent to delivery . 236
judgment liens preferred to 238
take precedence if registered prior to execution sale . . 239
title under, superior to judgments subsequently rendered . 240
purchaser without notice of, may give good title to subsequent purchaser with notice 241, 242

UNREGISTERED INSTRUMENTS — *Continued.* SECTION
but not to fraudulent grantor, or original purchaser with notice 243
conflicting decisions, as to what is sufficient notice of . . 244
express notice required 245
either actual or constructive held sufficient 246
See POSSESSION.
See TITLE PAPERS.
See LIS PENDENS.
cases holding notice of, ineffectual against the record . . 248
cases holding implied notice sufficient 249–251
should amount to imputation of fraud 252
withholding from record no fraud upon those having knowledge 253
effect of withdrawing from files before recorded 255
recorded prior to subsequent purchase 256
vague information of, insufficient to affect subsequent purchaser 258

VAGUE STATEMENTS,
of facts affecting title to real estate, disregarded by purchaser 29, 258

VENDOR'S LIEN,
purchaser with notice of 19
decreed to perform in lieu of original contracting party . 53
notice of, to purchasers, from recitals in title papers . 329, 330
from pendency of action to foreclose 342*a*

VOID NOTE,
notice of dishonor of, unnecessary 1028

VOUCHER,
to warranty,
See WARRANTY.

WAIVER,
of lien on property, by plaintiff, as against purchaser *pendente lite* 367
of notice of dishonor of commercial paper 930–975
general character of 930, 931
may be antecedent or subsequent to dishonor 932
antecedent waiver in writing — examples 933–938
may be verbal 939
established by circumstances 940–956
by subsequent promise to pay 957–975
of notice of trial 1175

WAIVER — *Continued.* SECTION
of notice of motions, and other court proceedings by appearance 1203
of notice of appeals 1220
of notice to take depositions 1253–1255
of notice to produce books and papers, to be offered in evidence 1284
of defective service of process by general, but not by special appearance 1358, 1359
of notice to quit 641–644
offering to let will not amount to 644
of rights under notice to quit 648
will not be presumed from acceptance of rent by unauthorized person 649
nor from mere permission to remain after expiration of original term 650

WAIVER AND EXCUSE,
of demand and notice to guarantors 426, 427
of notice of arrival of goods by common carrier 576
of notice, should be averred in pleading 1397
of notice of dishonor of commercial paper 930–1028
See BILLS AND NOTES.
See WAIVER.
See EXCUSE.

WARD,
when a party to bill or note, may give notice of dishonor . 727
when notice may be given to 773

WARRANTY,
of title, notice of breach of 480*c*–480*f*
the remedy that depends on notice 480*c*
form and sufficiency of notice 480*d*
waiver of notice 480*e*
by whom given 480*f*

WIFE,
affected by husband's knowledge, when acting as her agent 679
confined to transactions in which he acts for her . . . 680

WILLS,
registration of, operating as notice to purchasers . . . 108
notice from recitals in 324, 333

WITHDRAWAL,
of offer, notice of, before acceptance will be effectual . . 385

WITNESSES,
subscribing to deed, necessary to entitle to registry . 100, 137–139
need not be all named in notice to take depositions . . . 1227

WRITING, SECTION
contents of, conclusively presumed to be known to party executing same 43
notice by agent may be in, or verbal 699
original process required to be in 1147
notice of appeal to be in 1209
notice of taking depositions, generally in 1222
notice of dishonor of commercial paper, generally in . 831, 832
when to distant parties, should always be 833

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